Florida State University Law Review

Volume 22 | Issue 1 Article 4

Summer 1994

Eliminating Double Talk from the Law of Double Jeopardy

Eli J. Richardson

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Eli J. Richardson, *Eliminating Double Talk from the Law of Double Jeopardy*, 22 Fla. St. U. L. Rev. 119 (1994) .
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ELIMINATING DOUBLE-TALK FROM THE LAW OF DOUBLE JEOPARDY

ELI J. RICHARDSON

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ELIMINATING DOUBLE-TALK FROM THE LAW OF DOUBLE JEOPARDY

ELI J. RICHARDSON*

I. INTRODUCTION

THE Double Jeopardy Clause of the Fifth Amendment to the United States Constitution ("the Clause") provides, "[n]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[1] At first glance, the Clause does not appear to be a particularly troublesome provision, as the language appears to be conducive to easy interpretation.[2] Moreover, the concept of double jeopardy dates back thousands of years and exists in some form throughout the history of Western civilization.[3] Indeed, the term "double jeopardy" is sufficiently familiar to contemporary Americans to make an occasional appearance in modern popular culture.[4]

A great deal of confusion, however, underlies this renowned, appealing, and seemingly self-explanatory constitutional guarantee.[5] In

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* Associate, Rogers & Hardin, Atlanta, Georgia; J.D., 1992, Vanderbilt University; B.S.E., 1989, Duke University. Author, *Matching Tests for Double Jeopardy Violations with Constitutional Interests*, 45 VAND. L. REV. 273 (1992). The author wishes to thank John C. Herman and David Bissinger for their helpful comments on a draft of this Article.

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1. U.S. CONST. amend. V. Although the text of the Clause refers only to injury to life or limb, it applies to many kinds of punishments and prosecutions, most of which do not threaten the defendant's "life" or "limb" as such. *See infra* text accompanying notes 7-9.

2. "Given the simplicity of its language and the simplicity of its animating force, the interpretive history of the *Double Jeopardy Clause* perhaps should be a model of logical and conceptual clarity. It is anything but that." Ronald J. Allen, Bard Ferrall & John Ratnaswamy, *The Double Jeopardy Clause, Constitutional Interpretation and the Limits of Formal Logic*, 26 VAL. U. L. REV. 273, 281 (1991)(further stating that the language of the Clause is "beguilingly simple").

3. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 795 (1969)(noting that every state recognizes some prohibition against double jeopardy); Green v. United States, 355 U.S. 184, 187 (1957)(stating that the prohibition of double jeopardy "is deeply ingrained in at least the Anglo-American system of jurisprudence"); George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 325 n.9 (1986) [hereinafter Thomas, *In Search of a Definition*] (noting that the idea of double jeopardy dates back to ancient Greek, Hebrew, and Roman law and exists today in European and Asian nations).

4. *See, e.g.*, *Double Jeopardy* (CBS television broadcast, Oct. 24, 1993)(a fictional account of a controversial murder prosecution).

5. As Justice Rehnquist noted, "the decisional law in [the double jeopardy] area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Albernaz v. United States, 450 U.S. 333, 343 (1981); *see also* Allen, Ferrall & Ratnaswamy, *supra* note 2 at 275.

particular, confusion results from the United States Supreme Court's efforts to prescribe the scope of the Clause's protection of criminal defendants against successive prosecutions.[6] Although the Supreme Court has succeeded in prescribing the scope of the Clause's protection of defendants regarding cumulative punishments, the justices of the Court have sharply disagreed over the extent of the Clause's protection against successive prosecutions.[7]

In *United States v. Dixon*,[8] the Supreme Court attempted to clarify the scope of the Clause. Regardless of the merits of the case's holdings, *Dixon* illustrates the disagreement and confusion that has prevented the formulation of a cohesive and logical double jeopardy methodology.[9] Thus, *Dixon* does not constitute reform in the double jeopardy area, but rather demonstrates the continuing need for reform. This Article proposes a complete restructuring of the law of double jeopardy, identifying the basic problems plaguing double jeopardy jurisprudence[10] and proposing a new methodology for addressing double jeopardy issues.[11]

The uncertainty that plagues double jeopardy jurisprudence results from the Supreme Court's commission of several reasoning errors. First, the Supreme Court has developed tests for double jeopardy violations in successive prosecutions that simply ignore the obvious threshold requirements for double jeopardy protection: two or more jeopardies, and two or more "same" offenses.[12] The justices tend to formulate tests capable of finding double jeopardy violations for successive prosecutions even when the threshold requirements have not been satisfied.

Second, the Supreme Court has ignored the potential significance and distinctiveness of the word "for" in the Double Jeopardy Clause. Consequently, the Court unknowingly has applied the Clause whenever two jeopardies *involve* the same offense, even when those jeopardies are not *for* the same offense.[13] This pattern is unfaithful to the language of the Clause, resulting in the Court's failure

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6. *See, e.g.*, United States v. Dixon, 113 S. Ct. 2849 (1993) (revealing the confusion surrounding the Clause's protection against successive prosecutions in five separate opinions, each containing different reasoning and conclusions); *see also infra* note 101.

7. *See Dixon*, 113 S. Ct. 2849 (1993); Grady v. Corbin, 495 U.S. 508 (1990).

8. 113 S. Ct. 2849 (1993).

9. *See infra* notes 135-38 and accompanying text; *infra* notes 161-62 and accompanying text; *infra* notes 26 and 75.

10. *See infra* text accompanying notes 118-66.

11. *See infra* text accompanying notes 167-230.

12. *See infra* text accompanying notes 118-29.

13. *See infra* text accompanying notes 130-40.

to consider the governmental interests at stake in a given prosecution.[14]

Third, in successive prosecution cases, the Supreme Court often addresses issues and concerns different from those the Court purports to be addressing.[15] As a result, the Court's resolution of the ostensible double jeopardy issue often makes no sense. In particular, the Supreme Court often portrays double jeopardy decisions as turning on whether two "same offenses" exist in the case, when in reality, the Court's decision turns more on (1) the extent to which the defendant has been "twice put in jeopardy," or (2) the extent to which a second prosecution would be unfair to the defendant.[16]

As a result of this treatment, the collection of double jeopardy rules is difficult to apply. Furthermore, some of the individual rules make no sense vis-a-vis the language of the Double Jeopardy Clause. Thus, the relationship between the various tests is unclear, complicating a lower court's determination of the test or tests to be consulted in resolving a specific double jeopardy claim.

To eliminate the problems caused both by majority holdings and the reasoning of individual justices, this Article proposes a new methodology for clarity and flexibility in double jeopardy jurisprudence. The proposed methodology involves a two-step inquiry to determine whether cumulative punishments or successive prosecutions violate the Double Jeopardy Clause.[17] In addition, in successive-prosecution cases, a third step may be necessary to determine whether the successive prosecutions violate the Due Process Clause.[18]

The methodology's three steps are: (1) explicitly inquire whether the defendant has been put in jeopardy more than once and whether those jeopardies involved the same offense; (2) if so, determine whether those jeopardies were both *for* that same offense; and (3) if necessary, determine whether successive prosecutions violate substantive due process.

The methodology's double jeopardy inquiry comprises only steps one and two; cumulative punishments and successive prosecutions violate the Double Jeopardy Clause, if at all, by virtue of these two

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14. *See infra* text accompanying notes 186-97.

15. *See infra* notes 162-65 and accompanying text.

16. *See infra* text accompanying notes 142-61.

17. *See infra* text accompanying notes 168-87.

18. U.S. CONST. amend. V. (providing "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."). *See also infra* text accompanying notes 188-230.

steps. However, in successive prosecution cases, if successive prosecutions do not violate the Double Jeopardy Clause, the methodology requires that a court proceed to step three. In this final step, the court would determine whether the successive prosecutions are so unfair that they violate substantive due process even though they do not violate the Double Jeopardy Clause.

This methodology does not itself indicate the amount of protection against successive prosecutions or cumulative punishments to which defendants are entitled. Rather, the proposed methodology sets forth the procedure which courts should use to determine the level of protection existing against successive prosecutions and cumulative punishments. In other words, the methodology prescribes *how to determine* what protection exists, not *what* protection exists.

Under this methodology, courts could be fair to criminal defendants, flexible in defining "jeopardy" and "same offense," sensitive to governmental interests, and faithful to the language of the Double Jeopardy Clause. Lower courts could also resolve double jeopardy questions far more easily by using the proposed methodology rather than the confusing Supreme Court approach.

II. DOUBLE JEOPARDY JURISPRUDENCE BEFORE *Dixon*

According to the Supreme Court, the Double Jeopardy Clause generally[19] prohibits three occurrences: multiple (cumulative)[20] punishments for the same offense, subsequent prosecutions for an offense after a conviction for the same offense, and subsequent prosecutions for an offense after acquittal for the same offense.[21] To paraphrase, the Double Jeopardy Clause generally prohibits a second jeopardy—either a second punishment or a second prosecution—after a first jeopardy—either a prior punishment or a prior prosecution—for the same offense.[22] These three occurrences have two

19. As interpreted by the Supreme Court, the Clause always prohibits subsequent prosecutions for an offense after a conviction or acquittal for the same offense, and generally, but not always, prohibits multiple punishments for the same offense. *See infra* note 47.

20. As used in this Article, "cumulative" or "multiple" punishments refer to the imposition on a defendant of penalties that actually "add up," as opposed to penalties that coexist in some sense but are not both actually "felt" by the defendant. For example, two *consecutive* 10-year prison sentences are cumulative or multiple punishments. On the other hand, two *concurrent* 10-year sentences are not cumulative or multiple punishments. Even though both concurrent sentences are actual punishments imposed on a defendant, they do not truly result in punishment greater than a single 10-year sentence, because they both expire after 10 years.

21. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

22. Only part of this paraphrasing follows directly from the enunciation in *North Carolina v. Pearce* of the Clause's three protections. This paraphrasing contemplates four permutations. They are: a subsequent punishment for an offense after a prior prosecution for the

things in common. First, they all involve multiple jeopardies—either multiple prosecutions or multiple punishments.[23] Second, these multiple jeopardies all are for the same offense. Thus, according to the language of the Clause and the Supreme Court's enunciation of the scope of the Clause's protection, double jeopardy protection should not exist unless (1) the defendant is subjected to multiple jeopardies, and (2) those multiple jeopardies are for the same offense.[24]

To implement the protection contemplated by the Clause, the Supreme Court, before *Dixon*,[25] had specified four or five[26] situations

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same offense, a subsequent prosecution after a prior punishment for the same offense, a subsequent prosecution after a prior prosecution for the same offense, and a subsequent punishment after a prior punishment for the same offense. Only the last two permutations correspond precisely to one of the three protections. The first two permutations are not prohibited explicitly by one of the three protections.

Justice Scalia assumes the *Double Jeopardy Clause* prohibits the first permutation, a subsequent punishment for an offense after a prior prosecution for an offense. In *Dixon*, Justice White argued that under Justice Scalia's reasoning, the Clause would permit a subsequent punishment, but not a subsequent prosecution, for simple assault after a prior prosecution for simple assault. United States v. Dixon, 113 S. Ct. 2849, 2877-78 (1993)(White, J., concurring in part and dissenting in part). Justice Scalia disagreed, stating that "[u]nder basic *Blockburger* analysis, [a defendant] may neither be tried a second time for [simple] assault nor again convicted for [simple] assault . . . ." *Id.* at 2859 n.7 (discussing Blockburger v. United States, 284 U.S. 299 (1932)). Justice Scalia misses the point, however, in stating that this follows from *Blockburger*. *Blockburger* is nothing more than a definition of "same offense," *see infra* text accompanying notes 39-41, having nothing to do with what protection the *Double Jeopardy Clause* provides once "same offenses" are found to exist. Thus, *Blockburger* does not answer whether the *Double Jeopardy Clause* prohibits a subsequent punishment—quite apart from a subsequent prosecution—after a prior prosecution for the same offense.

Criminal defendants also are protected against the second permutation, a subsequent prosecution for an offense after a prior punishment for the same offense, albeit not solely by the *Double Jeopardy Clause*. If a defendant was punished for an offense, then he necessarily was prosecuted for that offense. Thus, a subsequent prosecution for an offense after a prior punishment for the same offense entails a second prosecution for an offense after a prior prosecution for that same offense. The second permutation, therefore, is the equivalent of the third permutation, and thus corresponds to protection available under *North Carolina v. Pearce*.

23. Multiple punishments do not necessarily entail multiple prosecutions. Unless prohibited by the *Double Jeopardy Clause*, a defendant can be subjected to multiple punishments without being subjected to multiple prosecutions, because a court can inflict multiple punishments on a defendant in the course of a single prosecution. *See, e.g.*, Missouri v. Hunter, 459 U.S. 359 (1983).

24. U.S. CONST. amend. V (suggesting both of these prerequisites to a double jeopardy violation); *Pearce*, 395 U.S. at 717.

25. 113 S. Ct. 2849 (1993).

26. A debate rages in the Supreme Court over whether one of the tests, which originated in *In re* Nielsen, 131 U.S. 176 (1889), is properly considered a fifth test, or whether the test merely duplicates protection already provided by one of the four other tests.

In *Dixon*, Justice Souter argued that *Nielsen* provides a conceptually distinct test for double jeopardy violations. According to Justice Souter, *Nielsen* held that the *Double Jeopardy Clause* bars prosecution for a single act included in a continuing offense—an offense comprising a series of acts—after conviction for the continuing offense. *See Dixon*, 113 S. Ct. at 2885

in which the Clause is violated. Before *Dixon*, the Court would determine whether any of the double jeopardy situations existed. If so, the Double Jeopardy Clause shielded the defendant from the second jeopardy. If not, the Clause did not shield the defendant, and the second jeopardy was permissible. These tests, hereinafter referred to as the "affirmative tests,"[27] may be referred to as *Blockburger*[28], *Ashe*[29], *Harris*[30], *Grady*[31] and *Nielsen*.[32]

A. *The* Blockburger *Test*

The test having the broadest applicability is known as the *Blockburger* test[33] and focuses strictly on the legal elements of the crimes charged in the first and second jeopardies.[34] Under the *Blockburger* test, when the same act or transaction constitutes a violation of two different penal statutes, the offenses are not the same if each statute requires proof of a fact that the other does not.[35] By negative implication, both offenses are the same unless each statute requires proof of a fact that the other does not.[36] In *Brown v. Ohio*,[37] the Supreme

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(Souter, J., concurring in part and dissenting in part). Thus, in Justice Souter's view, *Nielsen* provided a test for double jeopardy violations distinct from any other test. *Id.* at 2885-86.

Justice Scalia disagreed, stating that "*Nielsen* simply applies the common proposition, entirely in accord with *Blockburger*, that prosecution for a greater offense (cohabitation, defined to require proof of adultery) bars prosecution for a lesser included offense (adultery)." *Id.* at 2860.

Clearly, much confusion surrounds the role of *Nielsen* in double jeopardy jurisprudence. *See* Eli J. Richardson, *Matching Tests for Double Jeopardy Violations with Constitutional Interests*, 45 VAND. L. REV. 273, 295 n.154-55 (1992) [hereinafter Richardson]. However, in light of Justice Scalia's remarks in *Dixon*, the Supreme Court has not accepted *Nielsen* as a fifth test for double jeopardy violations.

27. The author calls these tests the "affirmative tests" because they are the only tests by which a court can affirm the existence of a double jeopardy violation. By contrast, other tests, hereinafter called "special" rules or tests, can reverse a finding of a double jeopardy violation indicated by an affirmative test. *See infra* text accompanying notes 80-89. These other rules are not "affirmative," because they can only negate, not affirm, the existence of a double jeopardy violation.

28. *See supra* note 22.

29. Ashe v. Swenson, 397 U.S. 436 (1970).

30. Harris v. Oklahoma, 433 U.S. 682 (1977).

31. Grady v. Corbin, 495 U.S. 508 (1990).

32. *In re Nielson*, 131 U.S. 176 (1889).

33. Although this test is named for *Blockburger v. United States*, 284 U.S. 299 (1932), the Supreme Court adopted the test in *Gavieres v. United States*, 220 U.S. 338, 342 (1911).

34. *See* Brown v. Ohio, 432 U.S. 161, 166 (1977).

35. *Blockburger*, 284 U.S. at 304.

36. *See Brown*, 432 U.S. at 168 (statutory offenses are the same if it is "*not* the case that 'each [statute] requires proof of a fact which the other does not.'") (quoting *Blockburger*, 284 U.S. at 304); *Brown*, 432 U.S. at 166 (prohibiting successive prosecutions as well as cumulative punishment under two separate statutes "[u]nless 'each statute requires proof of an additional fact which the other does not.'") (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)).

37. 432 U.S. 161 (1977).

Court identified a clear example of a double jeopardy violation under *Blockburger*. Based on a simple application of *Blockburger*, the Court in *Brown* held that the Clause prohibits the successive prosecution of a greater offense and a lesser-included offense.[38] This is logical because, by definition, conviction of the lesser offense requires no proof beyond that which is necessary for conviction of the greater offense.[39]

By itself, *Blockburger* does not inform a court whether a double jeopardy violation exists. *Blockburger* is phrased not as a test of whether the Double Jeopardy Clause is violated, but rather as a test of whether the crimes involved in the first and second jeopardies are for the "same offense." If the *Blockburger* test indicates that the same offenses are involved in the first and second jeopardies, the second jeopardy might violate the Double Jeopardy Clause.[40] The *Blockburger* test for "same offenses," however, cannot by itself answer the ultimate question of whether a double jeopardy violation exists. Even if the case involves "same offenses" according to *Blockburger*, a double jeopardy violation might not exist because other considerations might turn what otherwise would be a double jeopardy violation into a nonviolation.[41] Although *Blockburger* enables a court to determine whether the defendant's two jeopardies involved the "same offense," the Court cannot use *Blockburger* to determine whether the Double Jeopardy Clause prohibits the second jeopardy.

B. Additional Protection Against Successive Prosecutions

The Supreme Court's double jeopardy jurisprudence is much more complicated in successive prosecutions than in cumulative punishments. In the latter context, *Blockburger* is the only applicable test for double jeopardy violations.[42] By contrast, in successive prosecu-

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38. *Id.* at 168.

39. Whalen v. United States, 445 U.S. 684, 708-09 (1980).

40. *See Brown*, 432 U.S. at 166 (stating that under *Blockburger*, "[u]nless each statute requires proof of an additional fact which the other does not, the *Double Jeopardy Clause* prohibits successive prosecutions as well as cumulative punishment.")(citation omitted).

41. For example, suppose a defendant is tried for first-degree murder, but the trial ends in a mistrial at the defendant's request. If the state forces the defendant to stand trial a second time for first-degree murder, under *Blockburger* the defendant would be subject to a second trial for the same offense. Despite the existence of "same offenses" under *Blockburger*, however, the second trial generally would not violate the *Double Jeopardy Clause*, as the Supreme Court has held. *See* Oregon v. Kennedy, 456 U.S. 667 (1982)(holding that the *Double Jeopardy Clause* prohibits a retrial following a defense-requested mistrial only if the defendant can show that the prosecutor intended to goad the defendant into requesting a mistrial).

42. Even supporters of broad double jeopardy rights acknowledge that *Blockburger* is the exclusive test for double jeopardy violations in the cumulative-punishment context. *See* Grady v. Corbin, 495 U.S. 508, 517 n.8 (1990).

tions the Supreme Court has strayed further from the language of the Clause and created several additional tests for double jeopardy violations. Not surprisingly, the justices have been far more divided over the scope of the Clause as it relates to successive prosecutions.

Blockburger is one of several tests the Supreme Court formulated to determine whether successive prosecutions violate the Clause. *Blockburger* generally[43] bars successive prosecutions to the same extent that it bars cumulative punishments.[44] Although *Blockburger* is the only test a court can apply to find that cumulative punishments violate the Double Jeopardy Clause, the Supreme Court has created three or four[45] additional tests applicable only in successive prosecutions. A defendant can invoke the additional tests to show that successive prosecutions, but not cumulative punishments, violate the Double Jeopardy Clause.[46]

The Supreme Court's rationale for creating these extra safeguards against successive prosecutions is clear: more significant constitutional interests are at stake in successive prosecutions than in cumulative punishments. The Supreme Court has declared that the sole purpose of the Double Jeopardy Clause in the context of cumulative punishments is to ensure that a court imposes no more punishment on a defendant than the legislature intended.[47] In other words, in this

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43. Although *Blockburger* without exception prohibits successive prosecutions for the same offense, *Blockburger* does not always prohibit cumulative punishments for the same offense. Somewhat obliquely, the Supreme Court has declared that in the context of cumulative punishments, but not successive prosecutions, *Blockburger* is a mere rule of statutory construction: The legislature is presumed not to have intended to punish a person twice for offenses which are the "same" under *Blockburger*. If the prosecution can rebut this presumption, however, cumulative punishments, even for offenses deemed the "same" under *Blockburger*, are permissible. *See infra* note 47.

44. *See Brown*, 432 U.S. at 166.

45. Four additional tests exist if *In re* Nielsen, 131 U.S. 176 (1889), truly provides an additional source of double jeopardy protection not available under any other test. Only three additional tests exist, however, if *Nielsen* merely reiterates protection available under one or more of the other tests. Whether *Nielsen* in fact provides a separate source of protection, and thus constitutes a fourth additional test, is a matter of sharp debate. *See supra* note 26.

46. *See Grady*, 495 U.S. at 529 (Scalia, J., dissenting).

47. Missouri v. Hunter, 459 U.S. 359, 366 (1983). As a corollary, if the legislature demonstrably intended that a defendant be punished under two different statutory offenses, then the Clause permits the imposition of cumulative punishments under both statutes, even if both statutes punish the "same" offense. *See id.* at 368.

The Supreme Court has applied this separation of powers principle whether the legislature involved is Congress and the court is a federal court, or whether a state legislature and a state court are involved. If the *Double Jeopardy Clause*, in the context of cumulative punishments, truly does no more than prevent a court from imposing more punishment than the legislature intended, it is arguable whether federal constitutional concerns exist when cumulative punishments are imposed in the course of a single state proceeding. *See, e.g.*, Richardson, *supra* note 26, at 309-11 (arguing that defendants should not receive double jeopardy protection in the

context the Clause is not intended to protect individual rights, but rather to uphold the separation of powers principle that legislatures, not courts, authorize punishment.[48] The Supreme Court's view has been that cumulative punishments, whether or not for the same offense, do not truly implicate concerns involving a criminal defendant's rights.[49]

By contrast, the Clause is an extensive and significant safeguard of individual rights in the context of successive prosecutions. In particular, the Double Jeopardy Clause prevents the government from both harassing defendants with repeated prosecutions and rehearsing the case presentation at one trial in preparation for a subsequent trial.[50] In addition, the Clause protects criminal defendants from the embarrassment, expense, uncertainty, and anxiety caused by successive prosecutions.[51] To implement such protection, the Supreme Court has supplemented *Blockburger*'s protection against successive prosecutions. Unfortunately, the additional protection has developed into an incoherent collection of unrelated tests for double jeopardy violations.

1. Ashe v. Swenson

One such test emerged in *Ashe v. Swenson*,[52] where the Supreme Court purported to hold that the Double Jeopardy Clause embodies the doctrine of collateral estoppel in criminal cases (criminal collateral estoppel), meaning that once an issue of ultimate[53] fact has been

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context of cumulative punishments imposed in a single state proceeding if federal constitutional interests in cumulative punishments are truly limited to federal separation of powers concerns).

48. *See* Whalen v. United States, 445 U.S. 684, 695 (1980).

49. *Contra Hunter*, 459 U.S. at 374 (Marshall, J., dissenting)(arguing that cumulative punishments implicate legitimate concerns regarding criminal defendants' rights).

50. *See Grady*, 495 U.S. at 518.

51. *See* Green v. United States, 355 U.S. 184, 187 (1957).

52. 397 U.S. 436 (1970).

53. The Court in *Ashe* defined collateral estoppel in terms of "ultimate" issues. *Id.* at 442. This may have been imprecise, however. The Supreme Court and other federal courts since have held or stated that collateral estoppel applies to "necessary" (also known as "essential") issues. *See* United States v. Mendoza, 464 U.S. 154, 158 (1984); Synanon Church v. United States, 820 F.2d 421, 426-27 (D.C. Cir. 1987).

When used precisely, the terms "ultimate" and "necessary" have different meanings, and this distinction can be significant. Strictly speaking, an "ultimate" issue bears on facts that necessarily must be found for the court to impose obligations or sanctions. *See* The Evergreens v. Nunan, 141 F.2d 927, 928 (2d Cir. 1944), *cert. denied*, 323 U.S. 720 (1944). "Necessary" issues are those issues "actually recognized by the parties as important and by the trier of fact as necessary to the first judgment." *Synanon Church*, 820 F.2d at 427 (citing RESTATE-

decided by a valid and final judgment, the issue cannot be relitigated between the same parties.[54] In reality, however, the *Ashe* Court's holding is probably misstated. *Ashe* presumably incorporated only one side of collateral estoppel into the Double Jeopardy Clause. Because a criminal defendant is the only proper recipient of double jeopardy rights, *Ashe* doubtless requires only that the *defendant* receive the benefits of collateral estoppel.[55] Thus, the upshot of *Ashe* is that if an ultimate issue is decided in favor of a defendant against the prosecution, no prosecuting authority in the same jurisdiction may relitigate that issue against the same defendant.[56]

2. Harris v. Oklahoma

The Supreme Court established another test in *Harris v. Oklahoma*.[57] In *Harris*, the defendant was convicted of felony murder based on a homicide committed during an armed robbery, and the State subsequently sought to prosecute the defendant for the armed robbery.[58] *Blockburger* did not prohibit the second prosecution because felony murder required proof of something—a homicide—that armed robbery did not, and armed robbery required proof of something—an armed robbery—that felony murder did not.[59] However, the Supreme Court held that when a conviction of a greater crime cannot be had without proving[60] the lesser crime, the Double Jeop-

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MENT (SECOND) OF JUDGMENTS § 27 cmt. j (1973)).

Thus, when a criminal case turns upon whether the defendant has a valid alibi defense, the veracity of the defendant's alibi is a necessary issue but not an ultimate issue. The issue is necessary because the parties and the trier of fact recognize that it is important and necessary to the judgment. It is not ultimate, however, because it does not directly bear on the existence of the statutory elements of the crime charged—the only facts that necessarily must be found for the court to impose sanctions.

54. 397 U.S. at 443.

55. That the *Double Jeopardy Clause* requires the *prosecution* to receive the benefits of collateral estoppel is an interpretation that cannot be taken seriously.

56. *See id.* at 446 (stating that the true issue in *Ashe* is whether the state could force the defendant to relitigate an issue on which the defendant had previously prevailed).

Collateral estoppel would not prohibit a prosecuting authority in a different jurisdiction from relitigating the issue against the same defendant. A prosecuting authority in a different jurisdiction was not the party against whom the issue was decided the first time the issue was litigated. Thus, collateral estoppel would be inapplicable, because it bars relitigation of an issue only between the same parties involved in the first litigation of the issue.

57. 433 U.S. 682 (1977).

58. *Id.*

59. *See* Grady v. Corbin, 495 U.S. 508, 520 (1990).

60. The *Harris* Court actually stated: "When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the *Double Jeopardy Clause* bars prosecution for the lesser crime after conviction of the greater one." 433 U.S. at 682. However, apparently the Court was actually referring to conviction of the

ardy Clause bars prosecution for the lesser crime after conviction of the greater crime.[61]

Far from being revolutionary, *Harris* is merely a safeguard against an unconscionable, albeit unintended, legislative evisceration of *Blockburger*'s protection against successive prosecutions. In *Harris*, *Blockburger* did not bar the subsequent prosecution for the lesser offense after conviction of the greater offense, because felony murder did not require proof of the lesser offense of armed robbery; the prosecution proved armed robbery, but proof of any felony would have sufficed to prove felony murder.[62] This was true, though, only because the state legislature, for the sake of convenience, had lumped all felonies into a single felony murder statute rather than creating a separate murder statute for each felony. In other words, if the prosecution in *Harris* had not been able to rely on a single statute outlawing murder during the commission of any felony, but rather had to use a separate statute specifically outlawing murder in the commission of armed robbery, *Blockburger* would have barred the second prosecution. Thus, *Blockburger* failed to protect the defendant merely because the Oklahoma Legislature had found it convenient to use an all-inclusive felony murder statute to deal with all murders committed during felonies. Thus, without a special rule addressing this situation, a defendant would lose the protection that *Blockburger* contemplates. *Harris* does no more than prevent such an unfair result.

In fact, *Harris* is merely a prohibition of successive prosecutions for a greater and lesser-included offense.[63] As evidenced by *Brown v. Ohio*,[64] such a prohibition usually occurs pursuant to the application of *Blockburger*.[65] Indeed, the only situation in which *Harris* provides protection not already available under *Blockburger* is when a statutory offense expressly incorporates another statutory offense without

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greater crime without *proving* the lesser crime, rather than conviction of the greater crime without *conviction* of the lesser crime. In *Harris*, the defendant was convicted in the first trial only of the greater offense; he was neither charged with nor convicted of the lesser offense at the first trial. *Id.* Thus, conviction of the greater crime could be and was had without conviction of the lesser crime. However, conviction of the greater crime was not, and could not have been, obtained without proof sufficient to have convicted defendant of the lesser offense. Thus, contrary to its language, the rule of *Harris* actually is that when conviction of a greater crime cannot be had without proof sufficient for a conviction of the lesser crime, the *Double Jeopardy Clause* bars prosecution for the lesser crime after conviction of the greater crime.

61. *Id.*

62. *See Grady*, 495 U.S. at 528 (Scalia, J., dissenting).

63. *Harris*, 433 U.S. at 682.

64. 432 U.S. 131 (1977).

65. *See* Garrett v. United States, 471 U.S. 773, 787 (1985).

specifying the latter's elements.[66] Thus, *Harris* simply closes a loophole in the established rule prohibiting successive prosecutions for a greater and lesser-included offense. To this extent, *Harris* is consistent with, and in fact a corollary to, *Blockburger*.[67]

3. Grady v. Corbin

The most recent test originated in *Grady v. Corbin*.[68] In *Grady*, the Supreme Court, after reaffirming the other double jeopardy tests,[69] held that "[t]he Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[70]

4. In re Nielsen

Arguably, a fourth test is applicable in the successive prosecutions context. This test, which originated in *In re Nielsen*,[71] is responsible for much of the confusion regarding double jeopardy jurisprudence. In *Nielsen*, the defendant was first convicted of cohabiting with two wives, then was prosecuted and convicted for committing adultery with one of the wives during the three-year period of cohabitation.[72] The Supreme Court held that the Double Jeopardy Clause barred the adultery prosecution[73] on the grounds that a person convicted for a crime containing various "incidents" cannot be tried again for one of those "incidents."[74]

Supreme Court justices and commentators alike have disagreed over the meaning of *Nielsen*'s holding, and consequently have disagreed over *Nielsen*'s place in double jeopardy analysis. First, disagreement exists as to whether "incident," as used in *Nielsen*, means

66. *See Grady*, 495 U.S. at 528 (Scalia, J., dissenting).

67. *See* United States v. Dixon, 113 S. Ct. 2849, 2886 (1993)(Souter, J., concurring in part and dissenting in part).

68. *Grady*, 495 U.S. at 508.

69. *Id.* at 516-21.

70. *Id.* at 510.

71. 131 U.S. 176 (1889).

72. *Id.* The government's cohabitation indictment listed May 13, 1888 as the end of the cohabitation period, while the adultery indictment listed May 14, 1888 as the date of the adultery. The Supreme Court held, however, that the cohabitation indictment actually alleged cohabitation continuing until the indictment was returned in September of 1888. *Id.* at 177.

73. *Id.* at 187.

74. *Id.* at 188-89.

"statutory element" or whether it means "act."[75] If incident means "statutory element," *Nielsen* merely states the corollary to *Blockburger*,[76] that the Double Jeopardy Clause bars successive prosecutions for a greater and a lesser-included offense.[77] Under this interpretation, a court need never consider *Nielsen* separately, because *Blockburger* provides the same protection as *Nielsen*. If "incident" means "act," however, then *Nielsen* bars prosecution for a single act after conviction for a continuous offense—defined to include a series of acts—including that single act.[78] Under this interpretation, *Nielsen* is a discrete fifth source of protection that a court must consider in adjudicating double jeopardy claims.

Nielsen is indicative of the problems the Supreme Court's approach to successive prosecutions has created for lower courts. The Court has developed a haphazard collection of narrowly applicable tests for double jeopardy violations. In adjudicating double jeopardy claims, lower courts have been left to sift through these tests and guess at which ones apply and which ones overlap. As discussed below in Section IV, some of these tests are not only functionally cumbersome, but are also substantively deficient, making little sense vis-a-vis each other and the language of the Clause.[79]

C. *Special Double Jeopardy Rules Permitting Otherwise Impermissible Successive Prosecutions*

Even if a double jeopardy violation otherwise exists under the affirmative tests, a double jeopardy violation will not be found under some circumstances. The Supreme Court has created several special rules which can preclude a finding of double jeopardy even when one or more affirmative tests indicate a double jeopardy violation.

For example, the Supreme Court has held that the Double Jeopardy Clause generally does not bar a defendant's retrial when the first trial for the same crime ended in a mistrial at the defendant's request.[80] Similarly, if a first trial ended in a mistrial over the defen-

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75. *Compare* United States v. Dixon, 113 S. Ct. 2849, 2861 n.10 (1993)("incident" was intended to refer to an "element" of a criminal statute) *with id.* at 2885-86 n.5 (Souter, J., concurring in part and dissenting in part)("incident" was intended to mean "act").

76. *See id.* at 2886 (Souter, J., concurring in part and dissenting in part).

77. Having concluded that "incident" meant "element," Justice Scalia stated, "*Nielsen* simply applies the common proposition, entirely in accord with *Blockburger*, that prosecution for a greater offense (cohabitation, defined to require proof of adultery) bars prosecution for a lesser included offense (adultery)." *Id.* at 2860.

78. *Id.* at 2885 (Souter, J., concurring in part and dissenting in part).

79. *See infra* text accompanying notes 118-61.

80. *See supra* note 39.

dant's objection, the Clause does not prohibit a retrial if the prosecution can show that the mistrial was a "manifest necessity."[81] A third special rule is the "dual sovereign" rule, first announced in *United States v. Lanza*.[82] Under the dual sovereign rule, the Double Jeopardy Clause does not prohibit successive prosecutions under state and then federal law, or vice versa, even if the successive prosecutions would be impermissible if brought both under state law or both under federal law.[83]

Each of these rules can reverse an apparent finding of a double jeopardy violation reached under every affirmative test except *Ashe*.[84] In other words, even if a double jeopardy violation exists under any affirmative test except *Ashe*, the special rules can result in a finding of no violation. Even if two offenses are the same under *Blockburger*, they conceivably can be prosecuted successively, or punished cumulatively, by virtue of the special rules.[85] Even if two offenses are greater and lesser-included offenses under *Harris*, the special rules conceivably can permit successive prosecutions.[86] Even

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81. *See, e.g.*, Arizona v. Washington, 434 U.S. 497, 505 (1978) (quoting Winsor v. The Queen, L.R. 1 Q.B. 289, 305 (1866) (Cockburn, C.J.)).

82. 260 U.S. 377 (1922).

83. "[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *Id.* at 382.

84. The special rules never apply in situations where *Ashe* indicates a double jeopardy violation. A double jeopardy violation occurs under *Ashe* when a sovereign forces a criminal defendant to relitigate an issue that previously was decided in defendant's favor in a prosecution (brought by the same sovereign) that ended in a valid and final judgment. *See* Ashe v. Swenson, 397 U.S. 436, 443 (1970).

Thus, a double jeopardy violation under *Ashe* does not occur unless the first trial ends in a valid and final judgment. A mistrial, however, does not effect a valid and final judgment. Therefore, the special rules sometimes permitting retrial after a mistrial would not be applicable when *Ashe* indicates a double jeopardy violation.

Nor would the dual sovereign rule apply. A double jeopardy violation under *Ashe* does not occur unless the first and second prosecutions are both brought by the same sovereign. Successive prosecutions brought by the state and then the United States, or vice versa, are not brought both by the same sovereign, and thus no double jeopardy violation could occur under *Ashe*.

85. If the crime charged in the retrial requires no proof beyond that which was required to prove the crime charged in the original trial, application of *Blockburger* results in a finding of same offenses. This fosters the appearance that a double jeopardy violation has occurred. Due to the special rules permitting a retrial after an original trial, however, a double jeopardy violation may not have occurred.

In addition, although the *Double Jeopardy Clause* ordinarily prohibits cumulative punishments for the same offense, another special rule permits cumulative punishments for offenses deemed the "same" under *Blockburger*, as long as the legislature intended that the offenses be punished cumulatively. *See supra* notes 43 and 47. Thus, this special rule can reverse what otherwise would be a double jeopardy violation in cumulative punishments.

86. If felony murder (based on armed robbery) is charged at the original trial, and armed robbery is charged on retrial, then successive prosecutions for a greater and lesser-included

if *Grady* bars a second prosecution, the special rules might permit the second prosecution.[87] Similarly, even if *Nielsen* otherwise prohibits a second prosecution, it might be permitted under the special rules.[88]

The affirmative tests for double jeopardy violations, therefore, do not necessarily resolve the ultimate question of whether the Double Jeopardy Clause has been violated. Instead, the special rules ultimately might decide the double jeopardy claim. Thus, courts must keep in mind not only the numerous affirmative tests, but also the special rules. Lower courts are faced with an imposing number of disjointed rules, any one of which could conceivably govern the ultimate resolution of the defendant's double jeopardy claim. Working with such haphazard and random rules of inscrutable origin is extremely difficult.

Surely a court's task would be greatly simplified if double jeopardy rules were presented in a manageable framework with a logical and cohesive methodology that takes into account all of the protection and policy considerations underlying the current rules, yet ensures that each rule is explainable by the language of the Clause. Such a methodology is presented in Section V below.[89]

III. *UNITED STATES V. DIXON*

In *United States v. Dixon*,[90] a divided Supreme Court effected two changes in the law of double jeopardy. First, the Court overruled *Grady v. Corbin*, which held that the Clause bars a subsequent pros-

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offense have occurred. In this situation, a double jeopardy violation seemingly has occurred under Harris v. Oklahoma, 433 U.S. 682 (1977). *See supra* text accompanying notes 58-67. Due to the special rules permitting a retrial after an original trial, however, a double jeopardy violation may not have occurred.

87. If the prosecution, at the defendant's retrial, will prove conduct constituting an offense for which the defendant was prosecuted at the original trial, *Grady* seemingly signals a double jeopardy violation. Grady v. Corbin, 495 U.S. 508, 519 (1990). However, under the special rules permitting retrial after a mistrial, the retrial might not result in a double jeopardy violation, notwithstanding *Grady*.

88. *Nielsen* held that a person convicted for a crime containing various incidents cannot be tried again for one of those incidents. *In re* Nielson, 131 U.S. 176, 188 (1889). *Nielsen* presumably prohibits a defendant's retrial for an incident after previously being prosecuted for a crime containing that incident, whether or not the first prosecution resulted in a conviction, since the existence of double jeopardy protection generally does not depend on whether the defendant won or lost in the first jeopardy. Assuming this to be true, if there is a mistrial, *Nielsen* seemingly prohibits a retrial if the second trial involves an incident contained in the first trial. Due to the special rules permitting retrial after mistrial, however, the retrial might be permissible notwithstanding *Nielsen*.

89. *See infra* text accompanying notes 167-230.

90. 113 S. Ct. 2849 (1993).

ecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct constituting an offense for which the defendant already has been prosecuted.[91] Second, *Dixon* created, or at least confirmed, a source of limited protection against successive prosecutions.[92] The justice's divergent reasoning, displayed in the various *Dixon* opinions, exemplifies several of the problems plaguing double jeopardy jurisprudence.

A. Facts

In *Dixon*, the Supreme Court faced the consolidated appeal of two cases. In one case, respondent Dixon was arrested for second- degree murder, then released on bond.[93] As permitted by statute,[94] the court placed several conditions on Dixon's release, with the understanding that violation of any condition would subject him to prosecution for contempt of court.[95] One of the conditions was that Dixon not commit a criminal offense.[96]

While on release awaiting trial, Dixon was arrested and indicted for possession of cocaine with intent to distribute in violation of a District of Columbia statute.[97] A hearing was held allowing Dixon to show why he should not be held in contempt for violating the conditions of his release. After the hearing, the court concluded beyond a reasonable doubt that Dixon had violated the statute outlawing possession with intent to distribute.[98] The court found Dixon guilty of contempt for violating the court's pretrial release order, and sentenced him to 180 days in jail. Dixon moved to dismiss, on double jeopardy grounds, the pending indictment charging him with possession with intent to distribute.[99] The trial court granted Dixon's motion.[100]

In the second case, the respondent's wife obtained a civil protection order (CPO) ordering respondent Foster to refrain from assaulting, threatening, or abusing her in any manner.[101] Foster was

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91. *Id.* at 2860.
92. *See infra* note 114 and accompanying text.
93. *Dixon*, 113 S. Ct. at 2853.
94. The trial court was authorized to impose any condition of release that would "reasonably assure the appearance of the person for trial or the safety of any other person or the community . . . ." D.C. CODE ANN. § 23-1321(a) (1989).
95. 113 S. Ct. at 2853.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 2853-54.

subsequently charged with criminal contempt for violating the CPO, based in part on three alleged episodes of threatening and two alleged episodes of assaulting his wife.[102] After a hearing, the court found Foster guilty of both counts of contempt arising out of the assaults, but acquitted him from the three counts based on threatening.[103]

The Government[104] then indicted Foster on five counts, each based on one of the five relevant episodes at issue in the contempt proceeding. Foster was charged with three counts of threatening to injure another, each count based on one of the threatening episodes at issue in the contempt proceeding. In addition, Foster was charged with simple assault based on one of the assault episodes underlying the prior contempt prosecution. Finally, Foster was charged with assault with intent to kill based on the other assault episode at issue in the contempt proceeding.[105] Foster's motion to dismiss all five counts on double jeopardy grounds was denied by the trial court.

The District of Columbia Court of Appeals consolidated Foster's case with Dixon's and held that, under *Grady*, the Double Jeopardy Clause prohibited all counts of the pending prosecutions of both Dixon and Foster.[106]

B. Supreme Court Opinions

In a dizzying array of opinions,[107] the Supreme Court affirmed in

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102. *Id.*

103. *Id.*

104. The U.S. Attorney's Office obtained the indictment against Foster. Usually, a federal indictment after a prior criminal contempt conviction in local court would not raise double jeopardy concerns. Local and federal authorities usually represent different sovereigns—a state and the United States— thus rendering the *Double Jeopardy Clause* inapplicable to their successive prosecutions. *See supra* note 83 and accompanying text. In *Dixon*, however, both cases transpired in Washington, D.C. The local authorities were federal authorities, meaning that both cases involved a single sovereign, the United States.

105. *Id.* at 2854.

106. *Id.*

107. Five separate opinions were filed. Justice Scalia filed an opinion announcing the judgment of the Court. Only Justice Kennedy joined Justice Scalia's opinion in all respects, but Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas joined with that part of the opinion overruling *Grady*. Chief Justice Rehnquist filed an opinion, in which Justice O'Connor and Justice Thomas joined, concurring in part and dissenting in part. Chief Justice Rehnquist agreed that *Grady* should be overruled, but disagreed with the judgment of the Court that the *Double Jeopardy Clause* prohibited all of Dixon's indictment and the simple assault count of Foster's indictment. United States v. Dixon, 113 S. Ct. 2849, 2865 (1993).

Justice White filed an opinion, joined entirely by Justice Stevens and in part by Justice Souter, concurring in part and dissenting in part. Justice White agreed that the *Double Jeopardy Clause* barred Dixon's indictment and the simple assault charge of Foster's indictment, but felt that the remaining counts of Foster's indictment should also have been dismissed on

part and reversed in part.[108] The Court upheld the dismissal of Dixon's indictment on double jeopardy grounds.[109] In Foster's case, the Court also upheld the dismissal of the simple assault charge on double jeopardy grounds.[110] With respect to the count of assault with intent to kill and the three counts of threatening to injure another, however, the Supreme Court reversed, holding that the Double Jeopardy Clause did not bar Foster's prosecution.[111]

Although several aspects of the various opinions provide insight into the problems with the Supreme Court's current double jeopardy methodology, and thus merit discussion elsewhere in this Article, *Dixon* needs to be dissected to identify the case's holdings. Of course, one identifiable "holding" of *Dixon* is the Court's judgment that based on the specific facts of Dixon's case, the Double Jeopardy Clause barred his pending prosecution; and that based on the specific facts of Foster's case, the Double Jeopardy Clause barred Foster's pending prosecution for simple assault but not for the other charges. This holding is not easily translated into a black-letter rule applicable in future cases, however, because the case produced nei-

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double jeopardy grounds. *Id.* at 2868-69. Justice White's opinion, in essence, set forth three arguments. First, in a part joined by Justice Souter, Justice White argued that neither the fact that criminal contempt and the underlying offenses violate different governmental interests, nor the fact that judicial and prosecutorial administration might suffer if successive prosecutions for both are not allowed, changes the result that successive prosecutions for both violate the *Double Jeopardy Clause*. *Id.* In the second part of the opinion, Justice White argued that the Clause barred all counts in Foster's indictment, because every count was the same as an offense "at issue" in the criminal contempt proceeding. *Id.* at 2874. Finally, Justice White argued that *Grady* should not have been at issue in the case because the Court should have prohibited the indictments against both respondents under *Blockburger*. *Id.* at 2876. Moreover, Justice White argued that once in the case, *Grady* should not have been overruled. *Id.* at 2879.

Justice Blackmun also filed an opinion, concurring in part and dissenting in part. *Id.* at 2879. He argued that because punishment for criminal contempt serves a different purpose than punishment for the underlying crime, criminal contempt and the underlying crime are not the same offense, meaning that the *Double Jeopardy Clause* did not prohibit the pending prosecution of Dixon or Foster. *Id.* at 2880. Justice Blackmun, however, also stated that the Court should not have overruled *Grady*. *Id.*

Justice Souter, joined by Justice Stevens, also wrote an opinion concurring in part and dissenting in part. *Id.* at 2881. Justice Souter agreed that Dixon's indictment and the simple assault count of Foster's indictment should be dismissed on double jeopardy grounds, but felt that the remaining counts of Foster's indictment also should have been dismissed. *Id.* Justice Souter asserted that the Supreme Court had consistently recognized that, owing to the special burdens posed by successive prosecutions, the *Double Jeopardy Clause* provides broader protection in successive prosecutions than in cumulative punishments. *Id.* He also argued that the Court should not have overruled *Grady*. *Id.*

108. *Id.* at 2864.

109. *Id.* at 2858.

110. *Id.*

111. *Id.* at 2858-59.

ther a majority opinion,[112] nor a consensus as to how the judgment was reached. Thus, *Dixon*'s precedential value is limited to its facts.

Nonetheless, *Dixon* probably does establish an articulable precedential rule: The Double Jeopardy Clause prohibits a prosecution for an alleged violation of a criminal statute after a prior prosecution for criminal contempt based on a violation of a court order commanding the defendant not to violate that criminal statute.[113] It is unclear whether the rule provides protection previously nonexistent under the affirmative tests or merely illustrates a special application of the protection already existing under *Harris*.[114]

The other holding of *Dixon* is both more apparent and more significant. By a five-to-four vote, the Supreme Court expressly overruled *Grady*.[115] A detailed discussion of the justices' arguments for overruling *Grady* is beyond the scope of this Article. However, as set forth below,[116] *Grady* was marked by many analytical deficiencies, and therefore was an impediment to achieving a logical and cohesive double jeopardy methodology.[117] Thus, the overruling of *Grady* constitutes progress in the double jeopardy area.

IV. DOUBLE JEOPARDY JURISPRUDENCE IN JEOPARDY: PROBLEMS WITH THE SUPREME COURT'S METHODOLOGY

A. Ignoring the Requirement of Same Offenses

As noted above,[118] *Ashe* and *Grady* constitute the only safeguards against successive prosecutions which unquestionably are qualitatively distinct from *Blockburger*.[119] Scrutiny of *Ashe* and *Grady* re-

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112. Four justices joined part of Justice Scalia's opinion to form a majority to overrule *Grady*, but no majority opinion emerged detailing why the *Double Jeopardy Clause* did or did not prohibit the prosecutions for the crimes at issue. *See supra* note 107.

113. This follows from the narrowest reading of the facts of *Dixon*.

114. *Compare* United States v. Dixon, 113 S. Ct. 2849, 2857 (1993) *with id.* at 2867-68 (Rehnquist, C.J., concurring in part and dissenting in part).

115. Chief Justice Rehnquist and Justices Kennedy, O'Connor and Thomas joined Justice Scalia to overrule *Grady*. *See supra* note 107.

116. *See infra* text accompanying notes 125-29.

117. *See infra* text following note 129.

118. *See supra* notes 52-76 and accompanying text.

119. Harris v. Oklahoma, 433 U.S. 682 (1977), and *In re* Nielsen, 131 U.S. 176 (1889), are additional sources of protection against successive prosecutions. However, *Harris* merely closes an unacceptable loophole in *Blockburger*'s prohibition of successive prosecutions for greater and lesser-included offenses. *See supra* text accompanying notes 58-59. In addition, disagreement exists as to whether *Nielsen* provides a qualitatively different kind of protection than *Blockburger*, or is merely an alternative articulation of *Blockburger*'s prohibition of successive prosecutions for a greater and lesser-included offense. *See supra* note 26.

veals a curious fact: Under both tests, a double jeopardy violation can occur even when the first and second jeopardies do not involve what could reasonably be called the "same offense."

Under *Ashe*, a double jeopardy violation occurs only when, in a subsequent prosecution, a court fails to invoke the doctrine of collateral estoppel to prevent relitigation of an ultimate issue against a defendant who prevailed against the same sovereign on the same issue in a previous prosecution.[120] To determine whether *Ashe* abandons the requirement of a same offense, the following question must be answered: Does the fact that a court failed to apply collateral estoppel necessarily mean that the offenses involved in the first and the second jeopardies are the same? If the answer is no, the inescapable conclusion is that *Ashe* does not require two jeopardies involving the same offense.

Analytically, the first step in answering this question is to determine what is the same in the first and second prosecution.[121] The obvious answer is that the *issue* is the same.[122] However, to the extent that sameness of issues does not entail sameness of offenses, collateral estoppel is irrelevant to whether the offenses involved in both prosecutions are the same. In fact, collateral estoppel can bar relitigation of an issue in a second prosecution identical to an issue decided in a first prosecution, even when the issue is unquestionably irrelevant to any offense.

For example, suppose the Commonwealth of Pennsylvania prosecutes a defendant for armed robbery. Suppose further that the only disputed issue in the case was the identity of the perpetrator, that numerous witnesses positively identified the defendant as the robber, and that her fingerprints are positively identified on the robbery weapon. Imagine that the defendant mounts an alibi defense, offering overwhelming proof that, notwithstanding the prosecution's proof, she was in Hawaii at the time of the robbery. If the jury were to acquit the defendant, it likely would do so because the defendant was in Hawaii at the time of the armed robbery.

Pennsylvania then brings a second prosecution against the defendant, this time for an aggravated assault which occurred one hour

120. In *Ashe*, the Court held that the *Double Jeopardy Clause* requires that a criminal defendant receive the benefits of collateral estoppel. *Supra* notes 52-57 and accompanying text. When a court improperly fails to apply collateral estoppel, the *Double Jeopardy Clause* is violated.

121. *See generally infra* note 128.

122. A court should apply collateral estoppel only when the same issue that could be raised in a second prosecution was already litigated in a prior prosecution. This means that the application of collateral estoppel requires that the same issue be present in two consecutive jeopardies.

after the armed robbery, fifty miles from the site of the armed robbery. To convict the defendant, the prosecution must prove that the defendant was present at the murder scene. To do so, it would have to relitigate whether defendant was in Hawaii at the time of the murder. Such relitigation, however, is impermissible under *Ashe*.[123]

In this hypothetical, the similarity in the first and second prosecution is the issue of whether defendant was in Hawaii at the time in question. However, the issue relates to a fact—being in Hawaii—that has nothing to do with anything reasonably labeled as an "offense." Thus, even if the Hawaii issues are the same, they do not relate to offenses that are the same. Therefore, "same issue" should not translate into "same offense." Thus, under *Ashe*, a double jeopardy violation can occur even when it cannot reasonably be claimed that the "same offense" was involved in both prosecutions.[124]

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123. Actually, the relitigation of the issue presented in this hypothetical is prohibited only under one of two competing versions of collateral estoppel. Federal courts disagree over the kinds of issues that will trigger collateral estoppel. *See* Syanon Church v. United States, 820 F.2d 421, 426-27 (D.C. Cir. 1987). Some courts hold that collateral estoppel bars only "ultimate" issues, which are issues involving facts that necessarily must be found for the court to impose sanctions or obligations. *See* Evergreens v. Nunan, 141 F.2d 927, 928 (2d Cir. 1944), *cert. denied*, 323 U.S. 720 (1944). For example, in a criminal trial the only ultimate issues are the existence or nonexistence of each statutory element of the crimes charged; whether the court can impose criminal punishment on the defendant depends entirely on the existence or nonexistence of each statutory element.

Other courts have adopted a broader version of collateral estoppel, holding that collateral estoppel applies to "necessary" (also known as "essential") issues. Necessary issues are those issues "'actually recognized by the parties as important and by the trier of fact as necessary to the first judgment.'" *Syanon Church*, 820 F.2d at 427 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. j (1973)). For example, if a criminal trial turns on the veracity of the defendant's alibi, the issue of the validity of the defendant's alibi would be "necessary" but not "ultimate." *Supra* note 53.

According to *Ashe*, issues of "ultimate fact" trigger collateral estoppel. Ashe v. Swenson, 397 U.S. 436, 443 (1970). Thus, the *Ashe* Court appeared to endorse the ultimate-facts version of collateral estoppel. Given the casualness of the Court's description of collateral estoppel, however, the *Ashe* Court intended to provide only a general description of the collateral estoppel rule, not a final, binding statement of the rule. *See id.* at 443. Moreover, the Supreme Court has not adhered strictly to the ultimate-facts version. *See Syanon Church*, 820 F.2d at 426-27. In fact, since *Ashe* the Court has stated that collateral estoppel applies to issues "necessary" to the judgment, thereby perhaps endorsing the necessary-facts formulation of collateral estoppel. *See* United States v. Mendoza, 464 U.S. 154, 158 (1984).

124. Although the application of collateral estoppel in criminal cases should not be required under the *Double Jeopardy Clause*, other constitutional grounds exist for its application. One could rationally argue that, based on the unfairness of forcing relitigation of an issue on which a defendant previously had prevailed over the prosecution, criminal collateral estoppel is embodied in the *Due Process Clause* of the Fifth and Fourteenth amendments. *See* Hoag v. New Jersey, 356 U.S. 464 (1958) (declining to decide whether criminal collateral estoppel is embodied in the Due Process Clause of the Fourteenth Amendment).

In *Ashe*, however, the Court recognized collateral estoppel as a component of the *Double Jeopardy Clause*. Perhaps this constitutional basis was chosen because it is easier to package

In *Grady* the Supreme Court held that a double jeopardy violation occurs only if conduct constituting an offense for which the defendant was already prosecuted will[125] be proved in a second prosecution.[126] Although the *Grady* Court implied that the *Grady* rule was a definition of "same offense," the Court did not identify any part of the rule specifically intended to determine whether both prosecutions involved the same offense.[127] In fact, this structural flaw prevents a determinate application of the *Grady* rule. Although the *Grady* rule can determine that successive prosecutions violate the Double Jeopardy Clause, the rule simply cannot answer the antecedent question: Did both prosecutions involve the same offense?[128]

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collateral estoppel as a matter of double jeopardy concern than of due process concern. *See infra* text accompanying notes 193-94. At first glance, collateral estoppel seems consistent with the language of the *Double Jeopardy Clause*, in that both prevent the government from doing something to criminal defendants a second time. Collateral estoppel prevents the government from forcing a defendant to litigate an issue a second time if the defendant succeeded in litigating the issue the first time, while the *Double Jeopardy Clause* prevents the government from putting a defendant in jeopardy a second time after previously putting the defendant in jeopardy for the same offense. Notwithstanding this cosmetic similarity, criminal collateral estoppel is not properly considered a component of the *Double Jeopardy Clause*.

125. *Grady* is phrased in prospective terms; it bars subsequent prosecutions only if objectionable evidence *will* be introduced. For a discussion of the possible applicability of *Grady* in situations where objectionable evidence was not foreseen but was actually introduced, see Richardson, *supra* note 26, at 300-03.

126. *See* Grady v. Corbin, 495 U.S. 508, 510 (1990).

127. Although the *Grady* court stated that *Blockburger* is not the "exclusive definition of same offence" in the context of successive prosecutions, *id.* at 517 n.8, the Court did not explain how its rule related to or affected the definition of same offense.

128. A determination as to whether both prosecutions involved the same offense logically should involve identifying a set of facts in the first prosecution that is identical to set of facts in the second prosecution. If such a set of same facts reasonably can be labelled an "offense," then both prosecutions reasonably can be said to have involved the same offense. For example, *Blockburger* requires that the court look for a set of statutory elements for the crime charged in the first prosecution identical to a set of statutory elements in the second prosecution. A set of criminal statutory elements reasonably can be considered an "offense," so *Blockburger* ensures a reasonable finding that both prosecutions involved the "same offense."

For the *Grady* rule to bar a second prosecution, however, the only set of facts that must be the same in both prosecutions is a set that defines certain culpable conduct. Although culpable conduct reasonably can be categorized as an offense, the *Grady* rule does not stop there. For a double jeopardy violation to occur under *Grady*, it is not enough that both prosecutions involved the same culpable conduct. Instead, the rule does not apply unless two further requirements are satisfied. First, the culpable conduct introduced in the second prosecution must constitute an offense charged in the prior prosecution; it is not enough that culpable conduct proved in the second prosecution was the same as culpable conduct proved in the first prosecution. Second, the culpable conduct must be offered at the second trial to establish an essential element of a crime charged in the second prosecution; the existence of proof of the culpable conduct at the second trial is not enough, unless it is intended to establish an essential element.

Failure of either of these two further conditions means that no double jeopardy violation

Nevertheless, the Supreme Court and commentators alike apparently have assumed that both *Ashe* and *Grady* are, or at least contain, definitions of "same offense."[129] Accordingly, the Supreme Court has failed to recognize that the double jeopardy violation tests lack what should be a prerequisite: a threshold determination as to whether both jeopardies are for the same offense. Incognizant of such a significant deficiency, the Court's tests for double jeopardy violations make little sense, either in and of themselves or in relation to one another.

Simply put, the muddled state of double jeopardy jurisprudence is caused largely by the Supreme Court's abandonment of what should be the anchor of the Court's double jeopardy analysis: a requirement of same offenses. Absent this indispensable reference point, the Supreme Court's series of tests for double jeopardy violations cannot make sense vis-a-vis the language of the Clause.

B. Ignoring the Requirement that Jeopardies Be "for" the Same Offense

Perhaps the most subtle problem with double jeopardy jurisprudence is the Supreme Court's lack of attention to the word "for" in the Double Jeopardy Clause. In addition to requiring that multiple jeopardies and same offenses exist, the text of the Clause also requires that those multiple jeopardies be "*for*" the same offense. The

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occurs under *Grady*. If it is the culpable conduct which constitutes the same offense in both prosecutions, the failure of either of these conditions must cause the "sameness" of the culpable conduct in the two prosecutions to vanish, because failure of either condition could not otherwise take the defendant's situation out of the ambit of the *Double Jeopardy Clause*. However, failure of either condition is totally irrelevant to whether the culpable conduct should be classified as the same offense. The odd requirements of the *Grady* rule, therefore, work to divest offenses of their "sameness" for reasons totally unrelated to whether those offenses should be considered the "same" in the first place. Thus, *Grady* contains no logical means for identifying two sets of identifiable facts properly classifiable as "same offenses."

129. For example, in *Grady*, Justice Brennan's majority opinion suggested that the majority and the dissent were arguing over whether the Court should broaden the definition of "same offense" with the *Grady* rule. *See infra* note 143. Similarly, commentators have opined that *Grady* defines or at least contains a definition of "same offenses." *See, e.g.*, Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model*, 25 CONN. L. REV. 95, 97 (1992) [hereinafter Poulin, *Double Jeopardy Protection*] (stating that the *Grady* Court "enlarged the definition of same offense"); James M. Herrick, Note, *Double Jeopardy Analysis Comes Home: The "Same Conduct" Standard in* Grady v. Corbin, 79 KY. L.J. 847 (1991); Paul R. Robinson, Comment, *Grady v. Corbin: Solidifying the Analysis of Double Jeopardy*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 395, 409-10, 421 (stating that *Grady* broadened the definition of "same offense" in the *Double Jeopardy Clause* to include same "conduct," and listing *Ashe* as one of a series of tests for "same offense"); Sara Barton, Case Comment, Grady v. Corbin, *An Unsuccessful Effort to Define "Same Offense"*, 25 GA. L. REV. 143, 143 (1990).

justices' failure to appreciate the difference between multiple jeopardies *involving* the same offense and multiple jeopardies *for* the same offense has contributed to their confusion.

In everyday language, a significant difference can exist between an event *involving* something and an event *for* something. For example, although a bridal shower would be said to *involve* the guests, no one would claim that it is *for* the guests; the shower is *for* the bride. Similarly, under common English usage, multiple jeopardies can involve the same offense but not be for the same offense.

The Supreme Court has not grasped the distinction, implicitly equating "for" with "involving." For example, *Ashe*, which turned on the fact that a single issue litigated in each of two prosecutions related to a single criminal episode,[130] was concerned solely with whether same offenses were involved in each of two prosecutions.[131] Indeed, *Ashe* bars relitigation of certain issues in a second prosecution, irrespective of what crimes are charged in either prosecution.[132] In other words, *Ashe* operates without regard to what the successive prosecution is *for*.

Arguably, courts should construe "for" to mean the same thing as "involving."[133] Such a construction, however, is not self-evident.[134] In any event, the matter has a substantial impact on the extent of double jeopardy rights; a narrow interpretation of the word "for" would restrict double jeopardy rights, while interpreting "for" broadly enough to mean "involving" would expand double jeopardy

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130. *Ashe* held that the *Double Jeopardy Clause* requires the defendant receive the benefit of collateral estoppel, meaning that once an issue of ultimate fact is decided in favor of the defendant and against the government, the issue cannot be relitigated between the defendant and the same government. *See supra* text accompanying notes 52-57. The issue which the prosecution seeks to relitigate would not necessarily relate to criminal conduct. *See supra* text accompanying notes 123-24. In *Ashe*, however, as in most cases, the issue subject to relitigation did relate to criminal conduct.

131. In *Ashe*, criminal collateral estoppel applied because a single issue was involved in two successive prosecutions. Because the single issue related to a single criminal episode, it is reasonable to conclude that the *Ashe* Court was largely influenced by the fact that one "same" offense was involved—to the extent of giving rise to an issue—in each of two successive prosecutions.

132. The collateral estoppel rule operates regardless of the cause of action in which the relevant issue was raised. *See* Thomas, *supra* note 3, at 374 n.318 (noting that collateral estoppel sometimes fails to bar a second prosecution even if it would bar relitigation of an issue in the second prosecution).

133. In some contexts, "for" does mean "involving." *See Webster's Ninth New Collegiate Dictionary* 481 (1989) (defining "for," in definition number 7, as "concerning," which is a close cousin of "involving").

134. "For" is capable of many different definitions, depending on the context, some of which are significantly different from "involving." *See infra* note 184 and accompanying text.

rights. The issue is thus too important to be left to mere implication and assumption.

Moreover, the uncertain role of the word "for" in double jeopardy analysis has caused problems in the justices' reasoning. For example, in *Dixon*, Justice White rejected the government's argument that criminal contempt and the underlying crime were different offenses because the two crimes violated different governmental interests.[135] Justice White concluded that the legislative interests served by statutes should be irrelevant to whether the Double Jeopardy Clause bars successive prosecutions for violation of those statutes,[136] because the Double Jeopardy Clause was intended to limit—not defer to—the legislative prerogative to bring those successive prosecutions.[137] Justice White's comments, in addition to being irrelevant to the argument that they purportedly address,[138] are disappointing because he did not recognize that the language of the Clause itself indicates how double jeopardy analysis should take into account the governmental policy behind the criminal statutes at issue.

The word "for" suggests the proper place of governmental policy in double jeopardy analysis. For example, to say that the government may prosecute a defendant successively for criminal contempt and the underlying crime because they do not violate the same governmental interest is to say that they are not "for" the same offense.[139] A prosecution under a criminal contempt statute is a prosecution *for* the act prohibited by the criminal contempt statute—violating a court order. This is true regardless of what offenses the defendant committed in violating the order. By contrast, a prosecution brought under the underlying criminal statute is a prosecution *for* the act prohibited by the underlying statute—committing the underlying crime. Thus, the criminal contempt prosecutions in *Dixon* were not *for* the underlying offenses even though they undeniably

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135. United States v. Dixon, 113 S. Ct. 2849, 2870-71 (1993)(White, J., concurring in part and dissenting in part).

136. *Id.*

137. *Id.* at 2871. By contrast, Justice White noted that the Court has not considered the *Double Jeopardy Clause* to be a check on legislative power to impose cumulative punishments. In fact, in the cumulative-punishment context, the Court has considered the *Double Jeopardy Clause* merely an aid for determining whether a legislature would have wanted to impose cumulative punishments. *See id.* at 2870. Thus, Justice White conceded that in cumulative punishments, a difference in the governmental interests protected by two statutes might be relevant to whether cumulative punishments under both statutes violate the *Double Jeopardy Clause. Id.*

138. *See infra* text accompanying notes 162-66.

139. Instead of advancing this proposition in *Dixon*, the government argued that criminal contempt and the underlying crime were not the same offense.

involved the same offenses.[140] In this manner, the text of the Clause is reconcilable with the belief that the government sometimes should be allowed to conduct successive prosecutions to vindicate separate interests in cases involving the same offense.

As Justice White's dissent reveals, the failure to recognize the potentially unique connotations of the word "for" hinders the effort to reconcile relevant policy arguments with the text of the Clause. As set forth in Section V below, however, the Supreme Court easily could correct this shortcoming by specifically asking whether a defendant, in a case presenting two jeopardies involving the same offense, actually was put in jeopardy twice *for* that offense.

C. *Misunderstanding the Crux of the Debate*

As noted above,[141] the Supreme Court has been more willing to find double jeopardy violations in successive prosecutions than in multiple punishments.[142] The Court has justified this distinction on the grounds that the definition of "same offense" is broader for successive prosecutions than for multiple punishments.[143] Such an explanation, however, is both inaccurate and counterproductive.

1. *The Court's Decisions Have Not Turned on the Definition of "Same Offense"*

First, the explanation simply is not accurate in light of the kind of extra protection prescribed by the Supreme Court in successive pro-

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140. In *Dixon*, the same offense undeniably was *involved* in both the criminal contempt proceeding and the subsequent prosecution; in the cases of both petitioners, the subsequent prosecution was for the same offense on which the contempt proceeding was based.

141. *See supra* text accompanying notes 42-79.

142. "The interests at stake in avoiding successive prosecutions are different from those at stake in the prohibition against multiple punishments, and our cases reflect this reality. The protection against successive prosecutions is the central protection provided by the Clause." United States v. Dixon, 113 S. Ct. 2849, 2882 (1993)(Souter, J., concurring in part and dissenting in part).

143. *Grady* provides perhaps the best illustration of the Court's confusion of the threshold issue of what constitutes "same offenses" with the ultimate issue of whether the *Double Jeopardy Clause* provides protection against successive prosecutions. In *Grady*, Justice Brennan purported to respond specifically to Justice Scalia's assertion that *Blockburger* constitutes the sole definition of "same offense." Justice Brennan's response was to note that *In re Nielsen* and *Ashe* provided additional double jeopardy protection in successive prosecutions. Grady v. Corbin, 495 U.S. 508, 517 (1990). The fact that *Ashe* and *In re Nielsen* provide such protection, however, is irrelevant to whether they prescribe a definition of same offense broader than *Blockburger*'s.

Confronting Justice Scalia on this issue and defending his creation of the *Grady* rule, Justice Brennan appeared to believe that *Grady* also prescribed a definition of same offense. However, *Grady* prescribes no such threshold definition, but rather defines a complete test for determining when successive prosecutions violate the *Double Jeopardy Clause*. *See supra* notes 127-28.

secutions. As set forth above,[144] before *Dixon*, *Ashe* and *Grady* constituted the only protection against successive prosecutions unquestionably distinct qualitatively from *Blockburger*.[145] Neither *Ashe* nor *Grady*, however, contains a definition of "same offense." Thus, the extra protection offered by *Ashe* and *Grady* does not result from the fact that those cases prescribe an expanded definition of "same offense." Although the Supreme Court has mandated broader protection in successive prosecutions than in multiple punishments, the broader protection is not due to a broader definition of "same offense."[146]

Moreover, even if the Supreme Court had prescribed a different definition of "same offense" for each context, bifurcating the definition would be unjustifiable. First, in simplest terms, it is intrinsically unsatisfying to contemplate that "same offenses" are not always "same offenses."[147] Second, logic discourages varying the definition of "same offense" with the context involved. In deciding whether two same offenses exist, logic dictates that one must first determine whether there are two "offenses," and then, if so, whether the two offenses are the same. Neither inquiry should depend at all upon the context involved. Assuming that two offenses are involved,[148] the Court logically should juxtapose the two offenses, compare their characteristics, and decide whether their characteristics are sufficiently similar so that the offenses should be dubbed the "same."[149] Such a procedure should not take into account the context in which the issue of "sameness" has arisen.

At first glance, this proposition—that for double jeopardy purposes, "same" means "same"—appears to rest on a literal viewpoint of language in general, and constitutional interpretation in

144. *See supra* text accompanying notes 52-76.

145. *See supra* note 119.

146. The ultimate question of whether the *Double Jeopardy Clause* has been violated is different from the question of whether "same offenses" are involved. *See infra* text accompanying notes 154-61; *supra* text accompanying notes 79-89 (noting that the special double jeopardy rules can mandate a finding of no double jeopardy violation even when the court finds "same offenses").

147. *See* United States v. Dixon, 113 S. Ct. 2849, 2860 (1993)("[I]t is embarrassing to assert that the single term 'same offence' (the words of the Fifth Amendment at issue here) has two different meanings—that what *is* the same offense is yet *not* the same offense.").

148. Usually, both of the defendant's jeopardies clearly involve "offenses" for purposes of the Clause. A double jeopardy claim usually arises when a defendant has been jeopardized—punished and/or prosecuted—under substantive criminal statutes defining "offenses." However, in *Dixon*, the Supreme Court had to determine, at least implicitly, that criminal contempt is an "offense." *See id.* at 2855-56. *Dixon* thus presents a rare example of a prosecutorial argument that the defendant has not been jeopardized for "offenses."

149. *See supra* note 128.

particular. The point of this proposition, however, is not that a word used in the Constitution can have one true meaning which cannot vary with the context; as is understood by realistic observers of language communication, a word acquires its meaning from how people use it, and has different meanings in different contexts because people often use words differently in different contexts.[150] The point, rather, is that the Supreme Court should not give "same" varying meanings without a sufficient reason for doing so. However, the Supreme Court's recognition of multiple definitions for the word "same" is not justified by the usual reason for recognizing multiple definitions for a single word: different uses in different contexts. Had the Supreme Court not said otherwise, surely few would have thought to vary the use of "same" depending on the double jeopardy context involved.[151]

Not surprisingly, the Supreme Court has never invoked this reason to justify its recognition of a different, broader definition of "same offense" in the context of successive prosecutions. Instead, the Court's justification has rested on policy grounds; a defendant is constitutionally entitled to greater protection against successive prosecutions,[152] so the definition of "same offense" should be broader for successive prosecutions.[153]

This justification is flawed. Even if the Court's stilted treatment of the English language could be excused whenever necessary to protect criminal defendants, the Court could protect criminal defendants without illogically bifurcating the definition of "same offense." The Court could provide defendants extra protection against successive prosecutions without either (1) bifurcating the definition of "same offense," or, worse yet, (2) deceiving itself into believing that it has bifurcated the definition of "same offense" when in fact it has not.

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150. Thus, one can believe that "same" means "same" without maintaining, for instance, that "too" means "too." "Too" does not have one meaning for every context; it might mean "also" or it might mean "excessively." The reason to accept that the meaning of "too" varies with the context is that common experience tells us that people use the word differently in different contexts. By contrast, until the Supreme Court decided, for policy reasons, that the meaning of "same" should vary depending upon whether successive prosecutions or cumulative punishments were at issue, an ordinary user of the English language doubtless would not have thought that "same" had a different meaning in one context than the other.

151. If Supreme Court precedent is ignored, one would not anticipate even casual legal observers speaking on the subject of double jeopardy to say, "Of course, I mean 'same' in the successive-prosecution sense, not the multiple-punishment sense."

152. *See supra* note 142.

153. *See supra* note 143.

2. Misperceiving the Debate Over "Jeopardy" as a Debate Over "Same Offense"

The impression that the Court's double jeopardy cases turn on the definition of "same offense" is more than just inaccurate. It also is counterproductive, because it fosters a misunderstanding as to the true reason for the extra protection against successive prosecutions. By suggesting that the crucial difference between successive prosecutions and multiple punishments is that offenses are more apt to be the same where successive prosecutions are involved, the Court obscures its true beliefs regarding the differences between the two contexts. A student of the Court easily could believe that the contexts differ only in that offenses magically tend to be more similar when scrutinized in the context of successive prosecutions. Not only is such an impression incorrect,[154] it unfortunately diverts the student's attention from the truly important distinction between the two contexts.

Given the Court's stated reasons for providing extra protection against successive prosecutions,[155] the difference between the contexts clearly relates not to the requirement of "same offenses," but rather to the requirement of two jeopardies. Specifically, successive prosecutions are a different *kind* of jeopardy than multiple punishments. Indeed, from the standpoint of constitutional rights, successive prosecutions are a more significant kind of jeopardy because they impose greater burdens on criminal defendants than do multiple punishments.

The imposition of multiple punishments for the "same offense" harms a criminal defendant more than the imposition of a single punishment only by increasing his overall punishment; multiple punishments harm a criminal defendant only to the extent that their sum exceeds the punishment from a single punishment. However, the mere fact that a court imposes two different punishments—one for each of two same offenses—does not mean the defendant's punishment exceeds what it would have been under punishment only for one offense.

For instance, a defendant might be convicted in a single prosecution for two different offenses that are the same under *Blockburger*. Suppose that the greater offense is punishable by ten to twenty-five years in prison, while the lesser offense is punishable by five to ten years in prison. It is quite conceivable that the sentence-giver—either the judge or the jury—would first decide the appropriate total length of the sentence, based on the facts of the case, and only later, just

154. *See supra* text accompanying notes 145-61.

155. *See supra* notes 47-51 and accompanying text; *supra* note 143.

for the record, apportion that length between the greater and lesser crimes. In this plausible scenario, the defendant has not suffered by receiving multiple punishments for the same offense.

Moreover, the Constitution[156] probably would have permitted a court to impose the length of the combined sentence under just one of the statutes, if state law so permitted.[157] Thus, if the defendant was sentenced to fifteen years for the greater offense and ten years for the lesser offense, the defendant's objection to the twenty-five-year net sentence is not very compelling, because the defendant had no right not to be sentenced to twenty-five years for the greater offense alone.

By contrast, successive prosecutions inherently harm a defendant. The harm inflicted on a defendant by successive prosecutions is irreversible and unavoidable. Once a second prosecution is commenced against a defendant, the defendant must devote time, energy, and perhaps money to cope with the prosecution.[158] The defendant would not have been so harmed had the successive prosecutions never taken place. This is in contrast to multiple punishments, which might not harm the defendant any more than he would have been harmed if multiple punishments had not taken place.[159]

Thus, the Court's true justification for additional double jeopardy protection in the context of successive prosecutions is that successive prosecutions put defendants in a *worse* jeopardy than do multiple punishments. Admittedly, the Court has emphasized that successive prosecutions raise more pressing double jeopardy concerns than do multiple punishments.[160] Rather than identify these more pressing concerns as the reason for increased protection against successive prosecutions, however, the Court misleadingly has attributed the increased double jeopardy protection to the increased sameness of offenses in the context of successive prosecutions.[161]

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156. Other than the *Double Jeopardy Clause*, the Eighth Amendment's prohibition against cruel and unusual punishment is the constitutional provision most likely violated solely by virtue of the length of a sentence.

157. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 294 (1993)(stating that if a state constitutionally may impose a 15-year sentence under a statute, it constitutionally may impose a 25-year sentence under the statute). *But see* Whalen v. United States, 445 U.S. 684, 690 n.4 (1979)("The *Due Process Clause* of the Fourteenth Amendment . . . would presumably prohibit state courts from depriving persons of liberty or property . . . except to the extent authorized by state law.").

158. *See* Grady v. Corbin, 495 U.S. 508, 518 (1990)(citing Green v. United States, 355 U.S. 184, 187 (1957)).

159. *See supra* text preceding note 156.

160. *See supra* note 143.

161. *See supra* note 144.

In addition to being misleading, these pronouncements are counterproductive in that they tend to obscure the very proposition that the Court itself wishes to establish: that successive prosecutions burden defendants more severely than multiple punishments. By attributing the extra protection against successive prosecutions to the increased sameness of offenses rather than the increased severity of the jeopardy, the Court diverts attention from the special need to prevent the severe *kind* of double jeopardy inflicted by successive prosecutions.

In summary, the Court has mischaracterized the crux of the double jeopardy debate. In particular, the Court purports to debate whether it should recognize more than one definition of "same offense." In substance, however, the argument is over whether to recognize more than one category of "jeopardy," and then vary the amount of double jeopardy protection with the category.

D. Mismatching Questions and Answers

The Court's confusion of the threshold issue of what constitutes "same offenses" with the ultimate issue of whether successive prosecutions are impermissible causes a third unfortunate effect: justices address the latter issue when they supposedly are addressing the former.

For example, in *Dixon* the government argued that criminal contempt and the underlying crime were not the same offense because they violated two different governmental interests.[162] In his opinion, Justice White purported to address this argument and reject it, essentially on the grounds that the defendant's interest in avoiding successive prosecutions outweighed the government's interest in vindicating both governmental interests.[163] White's analysis arguably shows that the successive prosecutions in *Dixon* were unfair, but it does not show why criminal contempt and the underlying crime are the same offense—the issue that Justice White purported to be addressing.[164] After all, successive prosecutions for criminal contempt and the underlying crime could be considered unfair and unduly burdensome to defendants even if *not* for the same offense. Thus,

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162. United States v. Dixon, 113 S. Ct. 2849, 2854 (1993).

163. *See id.* at 2869-71 (White, J., concurring in part and dissenting in part).

164. One might argue that Justice White implicitly indicated that the offenses were the same because he found that the *Double Jeopardy Clause* had been violated. However, to so argue is to put the cart before the horse. The existence of same offenses should be a threshold requirement for finding a double jeopardy violation. Double jeopardy violations occur because there are same offenses; same offenses do not exist *because* there is a double jeopardy violation.

Justice White interchanged the issue of sameness of offenses with the issue of whether successive prosecutions should be barred as unfair. Similarly, the *Grady* Court[165] and commentators[166] have intermingled the same two issues. The inability to distinguish the two issues hinders the effort to arrive at a sensible resolution of either issue.

V. A PROPOSAL FOR REFORM

In light of the flaws in the Supreme Court approach, double jeopardy jurisprudence must be reformed to be clear, structured, and faithful to the language of the Clause. In addition, the reformed approach should be flexible enough to accommodate both broad and narrow interpretations of the scope of the Clause's protection. Furthermore, the reformed methodology should focus on the government's precise interest in the successive prosecutions at issue. In short, such an approach would be clear, flexible, and durable—all without subjugating the language of the Clause to judicial fiat.

The methodology set forth below satisfies such criteria. It comprises a two-step double jeopardy test applicable to both cumulative punishments and successive prosecutions. In addition, it comprises a third step, a due process test, applicable only to successive prosecutions.

In step one, a court explicitly inquires whether the defendant has been put in jeopardy more than once and whether those jeopardies involved the same offense.[167] Step one provides the Supreme Court with the opportunity to announce precedential definitions of "same

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165. In *Grady*, Justice Brennan appeared to assert that *Grady* constituted a new definition of "same offense." *Supra* note 144. However, Justice Brennan's true reason for creating the *Grady* rule was to prevent unfair prosecutions, not to prevent two jeopardies for a "same offense." *See* Grady v. Corbin, 495 U.S. 508, 521 (1990). Although Justice Brennan purported to address the issue of what constituted "same offenses," he actually addressed the broader issue of what successive prosecutions should be prohibited as unfair.

166. For example, in Poulin, *Double Jeopardy Protection*, *supra* note 129, at 100-01, Professor Poulin includes a section entitled, "Defining the Same Offense," in which she phrases the ultimate question in successive-prosecution cases as: "[T]o what extent does the Constitution permit fragmentation of prosecutions arising from a single course of criminal conduct?"

167. Step one can be regarded as containing two substeps, determining whether multiple jeopardies exist, and determining whether those multiple jeopardies involve the same offense. Substeps one and two, however, are interrelated. In the usual case, the best indicator of the existence of a "jeopardy" would be the fact that the defendant has been charged with or punished for an offense. In other words, a "jeopardy" exists not in a vacuum, but only in connection with a specific offense. Thus, the determination of whether multiple jeopardies exist is interrelated with, and perhaps even subsequent to, the court's identification of the offenses to be compared for sameness. Thus, substeps one and two cannot logically be undertaken without reference to each other. As a result, it is probably more useful to consider this part of the methodology a single step with two substeps, rather than two steps.

offense" and "jeopardy" for lower courts to use in conducting their own two-step double jeopardy tests. If step one indicates that the defendant was subjected to two jeopardies involving the same offense, then in step two a court determines whether those jeopardies were both *for* that same offense. After steps one and two, the double jeopardy inquiry ends.

In cumulative-punishment cases, steps one and two comprise the entire inquiry into the permissibility of those cumulative punishments. If successive prosecutions do not violate the Double Jeopardy Clause, however, a court then proceeds to step three, and determines whether the successive prosecutions at issue are so unfair that they are impermissible under the Due Process Clause.

A. Identifying Multiple Jeopardies and Same Offenses: Satisfying Textual Prerequisites for Double Jeopardy Protection

1. Identifying Multiple Jeopardies and Same Offenses

The proposed methodology begins with the actual language of the Clause. In particular, step one requires the court to determine independently whether the defendant was subjected to more than one jeopardy and, if so, whether the multiple jeopardies involved the same offense. Step one would provide the Supreme Court the opportunity to develop an evolving set of definitions for "same offense" and "jeopardy" for lower courts to use in applying step one in their own double jeopardy cases.

Step one, though grounded in the text of the Clause, is not a by-product of strict constructionism. Under this step, the terms "jeopardy" and "same offense" must be construed, but they need not be construed strictly. Ensuring that the textual prerequisites for double jeopardy protection are present in a given case does not necessarily restrict double jeopardy rights. Indeed, by adopting broad definitions, the Supreme Court could use step one to increase double jeopardy rights. By the same token, a Supreme Court less receptive to double jeopardy rights could decrease double jeopardy protection by narrowing the definitions of "same offense" or "jeopardy."

The Supreme Court could define "same offense" in any number of ways.[168] For example, it could equate "same offense" with "same

168. Although more definitions conceivably could exist, commentators have identified six possible definitions of "same offense." *See* George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 330-32 (1986); Paul R. Robinson, Comment, Grady v. Corbin: *Solidifying the Analysis of Double Jeopardy*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 395, 408-15 (1991).

conduct."[169] Under this broad definition, the government could not subject a defendant to cumulative punishments or successive prosecutions for[170] the same conduct, thus offering defendants a significant amount of double jeopardy protection. At the other end of the spectrum, the Supreme Court could define "same offense" as "offense defined under the same statute."[171] Under this ultra-narrow definition, offenses defined in two different statutes containing identical elements[172] would not constitute the same offense because they are set out in different statutes.[173] Between the extremes, the Supreme Court could continue to use *Blockburger* as its sole definition[174] of same offense.

Similarly, the Supreme Court could vary its definition of "jeopardy." For example, in *Dixon*, the Court held that the Double Jeopardy Clause did apply to contempt proceedings, thereby implicitly finding that a contempt proceeding is a "jeopardy."[175] However, if

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169. Justice Brennan approached this definition under his proposed "same transaction" test, under which the government must bring all charges against a defendant arising out of a single transaction in a single trial. *See* Ashe v. Swenson, 397 U.S. 436, 453-54 (1970). This test superficially appears to define "same offense" as "same transaction," i.e., "same conduct." However, the same transaction test does not prescribe a definition of "same offense." Rather, it is a complete description of when successive prosecutions are impermissible, and contains no interim mechanism for making a threshold determination of the presence of "same offenses." Moreover, by its terms the test is applicable only in successive prosecutions. Thus, even if the same transaction test did define "same offense" to mean "same transaction" or "same conduct," such a definition would be applicable only in successive prosecutions. Such a definition would be unsuitable for the proposed multi-step double jeopardy methodology, which seeks a uniform definition of "same offense" applicable in both the successive-prosecution and the multiple-punishment contexts.

170. For a discussion of the requirement that cumulative punishments or successive prosecutions be "for" the same offense, see *infra* text accompanying notes 183-87.

171. It seems inconceivable that "same offense" reasonably could be defined any more narrowly than "offense defined under the same statute."

172. Such statutes would outlaw crimes that are the "same offense" according to *Blockburger*.

173. This definition is undesirable in that it puts form over substance.

174. *Blockburger* is the only existing enunciation of a true definition of "same offense." *See supra* note 144 (noting that although several tests prohibit certain successive prosecutions, only *Blockburger* sets forth a threshold definition of same offenses).

175. United States v. Dixon, 113 S. Ct. 2849, 2856 (1993). The *Dixon* court did not clearly specify the basis for the government's argument that the *Double Jeopardy Clause* does not apply to criminal contempt proceedings. The argument that the *Double Jeopardy Clause* does not apply to contempt proceedings, however, must rely on the contentions that a criminal contempt proceeding is not a jeopardy or that criminal contempt is not an offense. No other contentions could support such an argument. However, these contentions are so interrelated that they are essentially the same. *See supra* note 167. Either way, such argument relies on the contention that a criminal contempt proceeding is not a jeopardy. As a result, in rejecting the argument that the *Double Jeopardy Clause* does not apply to criminal contempt proceedings, the Supreme Court implicitly rejected the argument that a criminal contempt proceeding is not a jeopardy.

the *Dixon* Court had wished to contract double jeopardy rights, it could have denied double jeopardy protection on the grounds that a criminal contempt proceeding is not a "jeopardy" within the meaning of the Clause.[176]

In summation, the Supreme Court could use step one to control the scope of double jeopardy rights by expanding or contracting its definitions. Step one thus would provide the Court both flexibility and an opportunity to announce clear definitions. At the same time, step one would restore the text of the Clause as the guiding light for double jeopardy jurisprudence, thus preventing double jeopardy law from succumbing completely to the passing whims of the Supreme Court.

2. *Accounting for the Special Double Jeopardy Rules*

To simplify double jeopardy inquiries, a methodology must take account of the special double jeopardy rules that reverse what otherwise would be a finding of a double jeopardy violation.[177] Any double jeopardy methodology unable to account for the special rules is incomplete; it would not necessarily resolve a double jeopardy claim, because the special rules existing outside of the methodology could resolve the claim. This would defeat the methodology's goal of resolving *every* double jeopardy claim by embodying *all* double jeopardy rules in a single framework.

Step one prevents this undesirable effect, because it can encompass the Supreme Court's special rules, preventing what otherwise would be a finding of double jeopardy. In all situations addressed by the special rules, the ultimate result—no double jeopardy violation—could be explained by the absence of a second jeopardy or the absence of same offenses. In other words, the Supreme Court could characterize the special rules as additional tests for determining when

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176. If the Court had so held, the pending criminal prosecutions in *Dixon* would have constituted only a first jeopardy, thus rendering inapplicable the Clause's protections against second jeopardies.

The Supreme Court has granted certiorari in another case which illustrates how the Court can resolve double jeopardy claims based on the definition of "jeopardy." In Kurth Ranch v. Montana Dept. of Revenue, 986 F.2d 1308 (9th Cir. 1993), *cert. granted* 114 S. Ct. 38 (1993)(No. 93-144, 1994 Term), the respondents were sentenced to prison on drug charges. The Montana Department of Revenue subsequently applied a nearly $865,000 marijuana tax to the petitioners' business enterprise. *Id.* at 1310. The respondents sued to have the assessment set aside on double jeopardy grounds. *Id.* at 1309. The bankruptcy judge set aside the assessment, and the Ninth Circuit affirmed. *Id.* The Supreme Court could decide this case easily under step one of the proposed methodology, simply by determining whether a tax assessment is a "jeopardy."

177. *See supra* text accompanying notes 70-89.

the defendant's situation involves a single, continuous jeopardy, rather than two jeopardies, or for determining when the defendant's situation does not involve same offenses.[178]

As a result, the Supreme Court easily could embody the special rules in the proposed methodology by holding that in situations now governed by the special rules, step one's requirement of multiple jeopardies or same offenses has not been satisfied. For example, in step one, the Court could easily recognize the special rule permitting retrial of a defendant after a defense-requested mistrial simply by holding that the retrial and the original trial constitute only a single jeopardy.[179] The Court could take account of the other special rules in similar fashion.[180] On the other hand, step one also provides the

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178. *See infra* note 180 and accompanying text for a discussion of how the special rules are explainable by the absence of two jeopardies or lack of same offenses. The Court has not explained the special rules on this basis, but has justified the rules occasionally permitting retrial after mistrial on policy, rather than textual, grounds. *See* Oregon v. Kennedy, 456 U.S. 667 (1982)(explaining that a retrial is generally permissible after a defense-request mistrial because policy considerations weigh in favor of the retrial); Arizona v. Washington, 434 U.S. 497, 505 (1978)(stating that if the mistrial is a "manifest necessity," a retrial is permitted after a mistrial granted over defendant's objection because a retrial would not be so unfair to the defendant as to outweigh the government's interest in the retrial).

The Court has justified the special rule occasionally permitting cumulative punishment for offenses that are the same under *Blockburger* not on textual grounds, but rather on separation of powers principles. *See, e.g.*, Whalen v. United States, 445 U.S. 684, 695 (1980). Of the special rules, only the dual sovereign rule has been explained somewhat on textual grounds. *See* United States v. Lanza, 260 U.S. 377, 382 (1922)(indicating that crimes are not the same if defined by different sovereigns). The Court has not particularly emphasized the textual basis for the dual sovereign rule, however, and has not applied the dual sovereign rule in the context of a disciplined textual methodology.

179. Such a holding effects a reasonable construction of the concept of a "jeopardy" and is an easy rule for lower courts to comprehend.

180. Under step one, the Court could recognize the dual sovereign rule, *see supra* notes 82-83 and accompanying text, simply by holding that offenses defined by two different sovereigns are not the "same." In fact, the Court has suggested such a basis for the dual sovereign rule. *See supra* note 178. The problem, however, is that because the Court has not connected the dual sovereign rule to an all-encompassing framework, the dual sovereign rule appears to be an *exception* to the Clause's prohibition of multiple jeopardies for the same offense. By embodying the dual sovereign rule within the framework of the proposed methodology, however, the Court would clarify that the dual sovereign rule permits successive prosecutions by different sovereigns precisely because those prosecutions are *not* for the same offense.

Under step one, the Court also could recognize the special rule permitting retrial after a mistrial ordered over the defendant's objection if the prosecution shows that the mistrial was a "manifest necessity." *See supra* note 81 and accompanying text. To do so, the Court need only hold that whenever the prosecution can show manifest necessity, the retrial and original trial constitute only a single, continuing jeopardy rather than two jeopardies. This result is somewhat unsatisfying, because the determination of whether a mistrial and a retrial constitute one continuous jeopardy or two separate jeopardies arguably should not turn on the reason for the mistrial. The retrial either is or is not properly considered a continuation of the original trial, and the answer should not depend on why the prosecution wanted the mistrial.

This discussion demonstrates the problems with recognizing, solely out of deference to the

Court with the flexibility to eliminate the special rules. For instance, if the Court wished to abolish the dual sovereign rule,[181] it could do so merely by holding that two offenses otherwise the same under step one are not different solely because they are defined by two different sovereigns.

Thus, the proposed methodology easily can effect the results achieved either by the special rules or by the absence of the special rules. Under the Court's approach, however, those results arise by virtue of a smattering of special rules collateral to, and in tension with,[182] the affirmative tests. In contrast, the proposed methodology dictates those results as part and parcel of the Court's core double jeopardy inquiry into the existence of two "jeopardies" and "same offenses."

B. Ensuring that the Jeopardies Are "for" the Same Offense

As set forth above,[183] part of the prevailing confusion in double jeopardy cases is attributable to the Court's failure to consider the significance of the word "for" in the Clause. The Court could decrease such confusion by requiring that if a court has found multiple jeopardies *involving* the same offense, the court then must inquire into whether those jeopardies were *for* that offense.

If one subscribes to the admittedly defensible viewpoint that "for" should carry the broad definition "involving," then this second step merely repeats the first step and is thus unnecessary. The

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prosecution's needs and wants, a rule permitting a retrial of a defendant. Such a rule subverts both the text of the Clause and the defendant's double jeopardy rights to the prosecution's interests. First, by its terms, the *Double Jeopardy Clause* sets forth an *absolute* prohibition against multiple jeopardies for the same offense; it does not contemplate that multiple jeopardies for the same offense *ever* are permissible. The text does not indicate that multiple jeopardies for the same offense, though otherwise impermissible, are permissible when the government has a good reason for requiring a second jeopardy.

Nevertheless, if the Court is bent on sacrificing the text of the Clause and the defendant's rights to prosecutorial interests, it is preferable to do so with a rule situated in the context of a cohesive methodology, rather than with the current dual sovereign rule, which appears unrelated and collateral to the central double jeopardy analysis.

Finally, under step one, the Court also could recognize the rule that a court may impose cumulative punishments on a defendant even for offenses that are the same under *Blockburger*, as long as the legislature intended punishment to be cumulative. *See* Missouri v. Hunter, 459 U.S. 359, 366 (1983). To do so, the Supreme Court need only hold that in these situations, the cumulative punishment constitutes only one punishment, i.e., only one jeopardy.

181. For a discussion of the dual sovereign rule, see *supra* text accompanying notes 82 and 83.

182. The special rules are in tension with the affirmative tests whenever the special rules dictate a finding of no double jeopardy violation in spite of the affirmative tests indicating a double jeopardy violation.

183. *See supra* text accompanying notes 130-40.

second step is necessary only if "for" carries a meaning narrower than "involving." The proposed methodology includes this second step, however, because "for" probably should have a narrower definition.

First, criminal prosecutions and convictions are one of the many contexts[184] in which "for" tends to be used in a specific, somewhat narrow sense. To demonstrate, imagine a court observer asking, "What is the defendant being prosecuted for?" or "What was the defendant convicted for?" Experience tells us that the observer expects a somewhat limited response amounting to a description of the actual charges brought against the defendant, rather than a discussion of the facts underlying the defendant's case. By contrast, if the observer were to ask, "What did the defendant's prosecution involve?" the observer probably expects a more detailed account of the defendant's case than a mere description of the actual charges. Therefore, the word "for" refers more specifically to the actual *charges* brought against the defendant, and "involving" refers more generally to the *surrounding facts* of the defendant's case.[185] Thus, the common usage of the word "for" in the context of criminal jeopardies suggests that a jeopardy "for" an offense refers to the charges, rather than the facts, in the defendant's case.

Second, as the Government argued in *Dixon*,[186] situations arise in which the defendant unquestionably has faced two jeopardies involving the same offense, and yet the second jeopardy is intended to vindicate an interest so different from the interest vindicated in the first jeopardy that it simply is unfair to force the government to vindicate both interests at the same time. In *Dixon*, for example, it seems fair to have allowed the prosecution to deal with the defendants' violation of the court orders (by committing the underlying offenses) before dealing with the underlying offenses. In fact, if the Government is not so allowed, the defendant could benefit from violating a court order by committing the underlying offense; such violation would force the prosecution to prepare a joint prosecution for contempt and the underlying offense, likely disrupting the prosecution's preferred and ordinary mode of conducting either prosecution.[187]

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184. In certain other contexts, "for" carries a limited specific meaning. For example, imagine a birthday present labeled, "For Mother." The word "for" means that the package is to be opened and/or owned by Mother, not that the package is concerning or relating to Mother.

185. Again, such a proposition is simply a matter of common English usage.

186. *See* United States v. Dixon, 113 S. Ct. 2849, 2870 (1993)(White, J., concurring in part and dissenting in part).

187. For example, in *Dixon* the Federal Government was not represented at Mr. Foster's

This is not to say that the Supreme Court should sacrifice even-handed double jeopardy analysis for the sake of prosecutorial convenience. On the contrary, in interpreting the Clause, it is proper to consider fairness and policy concerns from the prosecution's or the defendant's viewpoint, as long as the resulting interpretation reasonably comports with the language of the Clause. Evenhanded, disciplined interpretation is compromised only when concerns over policy and fairness result in an unreasonable interpretation of the Clause. Proposed step two, however, *requires* courts to be faithful to the language of the Clause. Thus, step two's accommodation of legitimate prosecutorial concerns does not compromise the actual language of the Double Jeopardy Clause.

C. Substituting the Due Process Clause for the Double Jeopardy Clause as Guardian Against Certain Unfair Successive Prosecutions

Although the Supreme Court has identified the Double Jeopardy Clause as the source of protection against successive prosecutions beyond *Blockburger*, such protection is not explainable by even the broadest possible interpretation of the language of the Clause.[188] The Court probably has invoked the Double Jeopardy Clause because such protection superficially seems to be a protection against double jeopardy.[189] In erroneously invoking the Double Jeopardy Clause, the Court has overlooked the perfect origin for additional protection against successive prosecutions: the Due Process Clause.[190]

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contempt hearing. Instead, counsel for Ms. Foster, the one injured by Mr. Foster's alleged acts of contempt, prosecuted the contempt action. *See id.* at 2854. Presumably, the Federal Government preferred not to expend effort in the contempt action, concentrating instead on preparing for the subsequent trial for the underlying offense. Under *Dixon*, however, the Federal Government must be prepared to bring its entire case at the time of the contempt proceeding, lest the *Double Jeopardy Clause* bar the subsequent prosecution for the underlying offense.

188. *See supra* notes 118-28 and accompanying text.

189. *Ashe* and *Grady* deceptively appear to constitute protection against what reasonably might be called "double jeopardy," because they both prohibit the government from doing something to criminal defendants a second time. *Ashe* prohibits the government from forcing a criminal defendant to litigate a second time an issue on which the defendant prevailed the first time. *Grady* prohibits the government from conducting a second prosecution against a defendant, if the government will prove conduct constituting an offense for which the defendant was prosecuted earlier. However, *Ashe* and *Grady* do not prevent the government from putting defendants in jeopardy a second time after the government has put them in jeopardy a first time. *See supra* text accompanying notes 118-28. As a result, even if *Ashe* and *Grady* prohibit the government from doing *something* to defendants a second time, they do not prohibit double jeopardy.

190. For the purposes of this Article, no distinction need be made between the *Due Process Clause* of the Fourteenth Amendment, applicable to state governments, and the *Due Process Clause* of the Fifth Amendment, applicable to the federal government.

To be sure, the Supreme Court has fleetingly addressed the intersection of the Double Jeopardy Clause and the Due Process Clause. Courts occasionally confront due process and double jeopardy claims brought simultaneously by a single defendant based on identical facts.[191] The Court even has prohibited certain prosecutorial activity on due process grounds when the Double Jeopardy Clause seemed more applicable to at least one justice.[192] The Court, however, has never barred a second prosecution on due process grounds when it has explicitly considered invoking the Double Jeopardy Clause instead.

It is not difficult to surmise the reason for the Court's reliance on the Double Jeopardy Clause instead of the Due Process Clause. In certain factual situations, the government does the same thing twice to a defendant, thus causing the situation to appear as superficially implicating the Double Jeopardy Clause. However, the Double Jeopardy Clause is not truly implicated unless the government twice *puts the defendant in jeopardy for the same offense*; the text of the Double Jeopardy Clause does not prohibit the government from doing anything else twice to a person. The Court has focused on the concepts of "same" and "twice,"[193] however, and therefore has had its

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191. *E.g.*, North Carolina v. Pearce, 395 U.S. 711, 723 (1969); United States v. Pungitore, 910 F.2d 1084, 1111-12 (3rd Cir. 1990).

192. *See* Blackledge v. Perry, 417 U.S. 21 (1974). In *Blackledge*, the defendant was convicted in a summary proceeding which, under North Carolina law, he had the option of bypassing in favor of a full-fledged trial. North Carolina law also provided that if a defendant was convicted in the summary proceeding, he had the right to a full-fledged trial de novo. In effect, by exercising the right to a de novo trial, the convicted defendant could start over, wiping the slate clean. The de novo trial, unlike the summary proceeding, provided a right to trial by jury.

In *Blackledge*, the defendant elected to proceed in the summary proceedings, and was convicted. He exercised his right to a de novo trial. The prosecutor thereafter sought to bring increased charges against the defendant, that is, charges that could result in greater punishment than possibly could have been imposed for the charges brought in the summary proceeding. The Supreme Court held that the *Due Process Clause* prohibited the prosecution from increasing the charges in response to the defendant's election to exercise his right to appeal. *See id.* at 28-29.

In dissent, Justice Rehnquist stated that the Court's holding "surely sounds in the language of double jeopardy, however it may be dressed in due process garb." *Id.* at 35 (Rehnquist, J., dissenting).

193. For example, in *Ashe*, the Court held that the *Double Jeopardy Clause* embodied the doctrine of collateral estoppel. Ashe v. Swenson, 397 U.S. 436, 445 (1970). The Court justified its holding on the grounds that criminal collateral estoppel "protects a man who has been acquitted from having to 'run the gantlet' a second time." *Id.* at 446; *id.* at 465 (Burger, C.J., dissenting) (noting that the majority's holding rested primarily on this language). In finding a violation of the *Double Jeopardy Clause*, the Court was swayed by the fact that the defendant had been subjected to *something* a second time. The Court, however, ignored the fact that what the defendant was subjected to a second time was litigation of a single issue, not jeop-

attention directed to the double jeopardy guarantee of not being twice jeopardized for the same offense. As a result, it perceives the issue to be one of double jeopardy, when in reality it is not, because the defendant undeniably has not been twice put in jeopardy for the same offense.[194] By failing even to consider alternate bases for such protection, the Supreme Court has implied that such protection could exist only by virtue of the Double Jeopardy Clause.

Therefore, although the Court has been aware of the existence of due process arguments in situations arguably within the ambit of the Double Jeopardy Clause, the Court has not recognized the Due Process Clause as a perfect shield against unfair successive prosecutions. By relying on appearances instead of a disciplined analysis of the Double Jeopardy Clause, the Court has created much confusion. Such confusion cannot be excused as necessary to achieve fair results, because, as argued below, the Due Process Clause is perfectly capable of encompassing the rights the Court wished to create. Extra protection against successive prosecutions—previously thought to be solely within the domain of the Double Jeopardy Clause—fits perfectly within both the text of the Due Process Clause and case law developed thereunder.

1. Due Process Protection Against Successive Prosecutions: Substantive or Procedural?

In considering whether due process rights actually could encompass the additional protection against successive prosecutions, one must first determine whether to seek such protection under procedural due process, substantive due process, or both.

As explained by one court, substantive due process focuses on *what* the government has done, whereas procedural due process focuses on how and when the government did what it did.[195] Under this characterization, distinguishing between procedural due process and substantive due process in successive prosecutions is somewhat

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ardy for a same offense. In other words, the Court ignored the fact that by its terms, the *Double Jeopardy Clause* protects against "running the gantlet" a second time only when "running the gantlet" translates into "being put in jeopardy for an offense"; to the extent that a person can "run the gantlet" without being put in jeopardy for an offense, the *Double Jeopardy Clause* should not protect against running the gantlet a second time.

194. In *Ashe*, for example, the Court's true concern was with defendants being forced to twice "run the gantlet." *See supra* note 193 and accompanying text. However, insofar as twice running the gantlet does not entail twice being put in jeopardy for the same offense, the Court's concern in *Ashe* did not actually implicate the *Double Jeopardy Clause*. *Id.*

195. Amsden v. Moran, 904 F.2d 748, 754 (1st Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991).

tricky.[196] For example, the protection created by *Ashe* could be characterized as either procedural or substantive. *Ashe* can be described as focusing on *what* the government cannot do—force a criminal defendant to relitigate an issue on which the defendant previously prevailed. On the other hand, *Ashe* also can be described as focusing on *when* the government cannot do what it does; the government cannot force a defendant to litigate an issue *after* the defendant has prevailed on that issue.

A more exacting comparison of substantive and procedural due process, however, reveals that only substantive due process could provide the extra protection against successive prosecutions. Substantive due process prohibits governmental action against an individual that would be unjustified even if taken in accordance with the most stringent procedural safeguards.[197] In other words, the government cannot take away substantive due process rights, no matter what procedure it uses.[198] By contrast, procedural due process is a safeguard against erroneous governmental conduct.[199] Thus, a lack of procedures risking an erroneous deprivation of an individual's protectable interest results in a procedural due process violation, but such violation can be cured by additional procedures that sufficiently lower the risk of error.[200] As this comparison indicates, procedural due process violations are impermissible governmental acts correctable by the addition of adequate procedures, whereas substantive due process violations are impermissible governmental acts that could never be permissible, no matter what procedures are available.

Against this background, it is apparent that the particular government act of unfair successive prosecutions could violate substantive, but not procedural, due process. A criminal defendant seeking to avoid a second prosecution after a prior prosecution does not desire more procedures.[201] Rather, the defendant's objection is that he is

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196. "Because the line dividing 'procedural due process' from 'substantive due process' is not always clear, it may be difficult in some cases to determine which is the proper characterization of the plaintiff's claim." Madden v. City of Meriden, 602 F. Supp. 1160, 1167 (D. Conn. 1985).

197. Daniels v. Williams, 474 U.S. 327, 331 (1986); Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987); *Madden*, 602 F. Supp. at 1166 (citing Rochin v. California, 342 U.S. 165 (1952)).

198. *See* Taylor v. Ledbetter, 818 F.2d 791, 794 (11th Cir. 1987).

199. *See* Knudson v. City of Ellensburg, 832 F.2d 1142, 1144 (9th Cir. 1987).

200. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976)(indicating that additional procedures reducing the risk of an erroneous deprivation of a protectable interest separate procedural due process violations from nonviolations).

201. *Cf.* United States v. Marshall, 908 F.2d 1312, 1320 (7th Cir. 1990), *reh'g denied, cert. granted sub nom.* Chapman v. United States, 498 U.S. 1011, *aff'd*, 111 S. Ct. 1919

subject to any procedures at all. The defendant's argument is that the second prosecution is impermissible, regardless of the procedures used either in the second prosecution or in deciding whether the second prosecution is permissible. Because the defendant's argument would be that he has a right (to avoid the second prosecution) that the government cannot take away pursuant to any procedures, he would be invoking substantive due process.[202]

Put another way, a procedural due process violation occurs when the government could deprive a person of a protectable interest under constitutionally acceptable criteria, but fails to provide procedures adequate for making a sufficiently accurate determination as to whether the criteria actually apply to that person. A substantive due process violation occurs when the government deprives a person of a protectable interest, but under unconstitutional criteria.[203] Under this characterization also, a second prosecution could violate only substantive due process. A procedural due process violation would indicate that, although a second prosecution of a defendant might be permissible under applicable criteria, the government has not provided procedures adequate for determining if the second prosecution satisfies the criteria. Of course, a defendant would not make such an argument. Rather, the defendant's argument would be that no constitutional criteria permit the second prosecution; in other words, that the second prosecution violates substantive due process.

2. *Substantive Due Process Protection Against Unfair Prosecutions*

Although substantive due process is the only *possible* source of additional protection under the Due Process Clause, it still must be determined whether, in light of all relevant principles of due process, it *actually is* an appropriate source of protection. The overriding principle of substantive due process is that it prohibits the government

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(1991). In *Marshall*, the defendants argued that the length of their sentences was excessive, in violation of the *Due Process Clause*. In noting that the defendants' argument was an appeal to substantive due process, the Court replied: "[D]efendants received ample 'process.' Their complaint is about substance, not process." *Id.* at 1320.

In fact, extensive procedures generally are provided before a defendant can be deprived of a liberty interest by being convicted and imprisoned pursuant to a criminal prosecution. Such procedures include right to trial by jury, right to counsel, right to confront adverse witnesses, right to present one's own witnesses, etc.

202. *Taylor*, 818 F.2d at 794.

203. Thus, a substantive due process violation occurs irrespective of the procedures involved. Even when the procedures available are so extensive that no doubt exists that under the applicable criteria the person should be deprived of his or her interest, a substantive due process violation exists if the criteria themselves are unconstitutional.

from using its power oppressively.[204] It has been stated—even more broadly—that the linchpin of substantive due process is fairness. As a result, the Supreme Court has held that substantive due process is violated by governmental actions that offend Anglo-American canons of decency, justice, and fairness; violate guarantees fundamentally rooted in American tradition; or violate rights implicit in the concept of ordered liberty.[205] Alternatively, courts have stated more simply, but no less vaguely, that substantive due process violations occur when fundamental fairness is violated.[206] Finally, perhaps the most graphic description is that a substantive due process violation comprises governmental action that "shocks the conscience,"[207] or "shocks" one's universal sense of justice.[208]

Clearly, the protection provided by substantive due process against unfair governmental action in general applies to unfair successive prosecutions in particular. The Court has held that a state's enforcement of its criminal laws must comply with the Due Process Clause of the Fourteenth Amendment.[209] Thus, every prosecution—the state's most important mechanism for enforcing its criminal laws—must comply with the Due Process Clause.[210] Applying a straightforward due process analysis is therefore appropriate to determine whether successive prosecutions violate the Due Process Clause.

By its terms, the Due Process Clause protects individuals from being deprived of three things without due process of law: life, liberty, and property.[211] A criminal defendant has a liberty interest in being free from reprosecution.[212] Having established that liberty interest,

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204. *See* Daniels v. Williams, 474 U.S. 327, 331 (1986); *see also* Guntharp v. Cobb County, 723 F. Supp. 771, 774 (N.D. Ga. 1989)(clarifying that the cited passage of *Daniels* relates specifically to substantive due process).

205. *See* Rochin v. California, 342 U.S. 165, 169 (1952); *see also* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

206. *See, e.g.*, United States *ex rel.* Crist v. Lane, 745 F.2d 476, 482 (7th Cir. 1984), *cert. denied*, Crist v. Lane, 471 U.S. 1068 (1985); *cf.* Lassiter v. Department of Social Services of Durham County, 452 U.S. 18, 24 (1981)(stating that due process "expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty"), *reh'g denied*, 453 U.S. 927 (1981).

207. *Rochin*, 342 U.S. at 172.

208. United States v. Akinseye, 802 F.2d 740, 743 n.2 (4th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987).

209. McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 435 (1988).

210. *See* Blackledge v. Perry, 417 U.S. 21, 25 (1974); United States v. Pungitore, 910 F.2d 1084, 1112 (3rd Cir. 1990) (examining successive prosecutions for compliance with substantive due process); United States v. Taylor, 749 F.2d 1511, 1513 (11th Cir. 1985)(a prosecutor's decision to reindict is limited by substantive due process).

211. *See, e.g.*, Cospito v. Heckler, 742 F.2d 72, 80 (3rd Cir. 1984), *cert. denied*, 471 U.S. 1131 (1985).

212. "We believe à defendant has a liberty interest in being free from reprosecution in

the next step in the due process inquiry is to determine what process is due the holder of that interest, and whether the holder received such process.[213]

Thus, the Court could find that successive prosecutions violate a defendant's right to substantive due process if there is some governmental action that is strikingly unfair in light of fundamental principles of American justice.[214] In step three of the proposed methodology, the Court would have the power to decide whether successive prosecutions are so unfair that they violate the Due Process Clause.

By creating extra protection against successive prosecutions in this manner, the Court would avoid the functional obstacles created by the language of the Double Jeopardy Clause. It is easier to prohibit a second prosecution on the subjective grounds of unfairness than to prohibit it on the grounds that it would subject the defendant to a second jeopardy for the same offense.[215] Indeed, most adopted or suggested rules curbing successive prosecutions—*Ashe* and *Grady*, for example—cannot be justified on the latter grounds.[216]

By contrast, those rules can be and always have been justified on the former grounds. In fact, the justices consistently have justified these rules not as being necessary to avoid twice putting a defendant in jeopardy for the same offense, but rather as being necessary to avoid subjecting a defendant to unfairness not acceptable under fundamental principles of American justice.

For example, to justify its holding that the Double Jeopardy Clause requires that a defendant receive the benefits of criminal collateral estoppel,[217] the *Ashe* Court explained that criminal collateral

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violation of the *Double Jeopardy Clause* . . . ." United States v. Delgado-Miranda, 951 F.2d 1063, 1064 (9th Cir. 1991) (emphasis added). A defendant obviously has a liberty interest in avoiding a reprosecution, which might effect a prison sentence ending his or her liberty. Furthermore, a defendant has the liberty interest no matter what kind of prosecution threatens it; whether the prosecution would violate the *Due Process Clause*, *Double Jeopardy Clause*, or some other law, the defendant has the same desire to stay out of jail.

213. Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976); Beard v. Livesay, 798 F.2d 874, 879 (6th Cir. 1986).

214. Courts consistently have stated that defendants are denied due process by governmental actions that violate Anglo-American canons of decency, guarantees fundamentally rooted in American tradition, and the like. *See supra* text accompanying notes 205-07.

215. Finding unfairness involves nothing more than making a subjective moral judgment about the facts of the case. Finding two jeopardies for the same offense is more complicated. It requires applying definitions of "jeopardy" and "same offense," then examining the interrelationship between the jeopardies and same offenses to determine whether the jeopardies both are "for" the same offense.

216. *See supra* text accompanying notes 118-28.

217. *See supra* text accompanying notes 53-57.

estoppel had existed in federal courts for more than fifty years and is generally a bedrock principle of American justice.[218] In addition, rather than explain how criminal collateral estoppel protects the defendant from a second jeopardy for the same offense, the *Ashe* Court argued that its rule "protects a man who has been acquitted from having to run the gantlet a second time."[219] Similarly, the *Grady* Court justified its rule simply on the grounds that it was necessary to prevent defendants from facing excessive burdens, harassment and expense.[220]

There are two potential objections against using the Due Process Clause, rather than the Double Jeopardy Clause, to support heightened protection against successive prosecutions. The first is that due process standards are simply too vague, too unpredictable and too subject to shifting political winds on the Supreme Court.[221] Undeniably, the Due Process Clause is vague; intentionally so, in fact.[222] Moreover, the particular due process principles useful in successive prosecutions may be particularly vague.[223] Until now, however, extra protection against successive prosecutions has been created under equally vague and politically motivated standards,[224] even though the

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218. *See* Ashe v. Swenson, 397 U.S. 436, 443 (1970).

219. *Id.* at 446.

220. Grady v. Corbin, 495 U.S. 508, 521 (1990).

221. The creation of rights under substantive due process is often criticized on these grounds. For example, in Roe v. Wade, 410 U.S 113 (1973), the Supreme Court relied on substantive due process to strike down a Texas statute prohibiting abortions. In dissent, Justice White wrote:

> The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing women and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

Id. at 222 (White, J., dissenting).

222. *See* Lassiter v. Department of Social Services of Durham County, 452 U.S. 18, 24 (1981)(declaring that " 'due process' has never been, and perhaps can never be, precisely defined."), *reh'g denied*, 453 U.S. 927 (1981); Rochin v. California, 342 U.S. 165, 171-72 (1952)(noting that reconciling continuity with a changing, progressive society renders a fixed interpretation of the *Due Process Clause* impractical).

223. Under the proposed methodology, the Court would create due process rights against successive prosecutions based on a completely subjective judgment as to what is fair. *See supra* text accompanying notes 214-15.

224. The Supreme Court's approach to creating double jeopardy rights has been strongly shaped by individual justices' political philosophies regarding the use of governmental power. *See supra* notes 49, 50, and 159 and accompanying text.

Court has attempted to cloak such protection in the guise of the Double Jeopardy Clause. Thus, by invoking the Due Process Clause instead of the Double Jeopardy Clause, the Supreme Court would not substitute vague standards for clear standards. Rather, the Court likely would maintain equally vague standards, but would justify the standards under a provision *intended* to spawn vague standards, rather than under a provision that should *not* foster vagueness.[225] Thus, by relying on the Due Process Clause instead of the Double Jeopardy Clause, the Court would not sacrifice predictability, but rather would attribute any unpredictability to the Due Process Clause—where unpredictability is to be expected—instead of the Double Jeopardy Clause—where unpredictability should not be expected.

The second possible objection is that, under settled law, substantive due process is least applicable when accompanied by a specific constitutional provision.[226] On closer analysis, however, this constitutional truism is irrelevant here. A court would reach the substantive due process test of step three only if the court made a prior determination, in steps one and two, that the Double Jeopardy Clause does not apply to bar the successive prosecutions. A court would apply substantive due process only to a second prosecution that is *not* within the scope of the Double Jeopardy Clause because it does not put a defendant in jeopardy a second time for the same offense.[227]

Indeed, the Supreme Court and commentators have realized, albeit unwittingly, that successive prosecutions can implicate due process more than the double jeopardy guarantee. In *Ashe*, the Court stated that the question in the case was "whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again."[228] The Court's reference to the Constitution generally, rather than the Double Jeopardy Clause in particular, is suggestive. Such reference revealed the *Ashe* Court's perception that the actual issue is whether the relitigation violated the Constitution, not

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225. *See supra* note 2 and accompanying text.

226. *See, e.g.*, United States v. Marshall, 908 F.2d 1312, 1320 (7th Cir. 1990), *reh'g denied, cert. granted sub nom.* Chapman v. United States, 498 U.S. 1011, *aff'd*, 111 S. Ct. 1919 (1991).

227. Under the proposed methodology, a second prosecution subjected to the substantive due process analysis of step three could not be for the same offense as a first jeopardy. If it were, then the second prosecution would have been barred under steps one and two of the methodology, and the court never would have reached step three.

228. Ashe v. Swenson, 397 U.S. 436, 446 (1970).

whether the relitigation violated the Double Jeopardy Clause. Commentators also have stated that the ultimate question is whether successive prosecutions violate the Constitution.[229]

Such pronouncements reveal an implicit belief that successive prosecutions actually should be tested against more general constitutional standards rather than against the Double Jeopardy Clause. The source of these general constitutional standards undoubtedly would be substantive due process, the Constitution's source of substantive rights in areas not specifically addressed by a provision in the Constitution.[230]

Thus, the Supreme Court and commentators unknowingly have suggested substantive due process as a source of protection against successive prosecutions.

VI. CONCLUSION

Relative to many other constitutional provisions, the language of the Double Jeopardy Clause is conducive to a structured methodological interpretation. Specifically, the text of the Double Jeopardy Clause sets forth two prerequisites for double jeopardy protection in a given case: multiple jeopardies and same offenses. The Clause also prescribes the necessary relationship between those prerequisites; that is, the multiple jeopardies must be *for* the same offense. On its face, therefore, the Double Jeopardy Clause announces a multi-step violation test.

Nevertheless, the Supreme Court has developed tests for double jeopardy violations which depart drastically from the self-evident multistep test. Particularly, in the successive-prosecution context, in creating tests additional to *Blockburger* for double jeopardy violations, the Supreme Court has ignored the threshold issues of whether the defendant's case involves two jeopardies and two same offenses. The Court has completely overlooked the significance of the Clause's requirement that both jeopardies *be for* rather than simply *involve*

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229. *See* Thomas, *In Search of a Definition*, *supra* note 3, at 345 ("Therefore, as Justice Brennan has argued, the required evidence [*Blockburger*] test may not satisfy the Constitution in the context of successive prosecutions."); Poulin, *Double Jeopardy Protection*, *supra* note 125, at 100 ("The question is, to what extent does the Constitution permit fragmentation of prosecutions arising from a single course of criminal conduct?").

230. *See* Roe v. Wade, 410 U.S. 113, 168 (Stewart, J., concurring)("the 'liberty' protected by the *Due Process Clause* of the Fourteenth Amendment covers more than those freedoms explicitly named in the *Bill of Rights*") (emphasis added); United States v. Marshall, 908 F.2d 1312, 1320 (7th Cir. 1990)(noting that recognizing substantive due process rights is least appropriate in areas in which there exist specific constitutional provisions), *reh'g denied, cert. granted sub nom.* Chapman v. United States, 498 U.S. 1011, *aff'd*, 111 S. Ct. 1919 (1991).

the same offense. As a result, the Supreme Court's approach to successive prosecutions is both unfaithful to the language of the Clause and oblivious to the governmental concerns implicated in successive-prosecution cases. Moreover, the Court's approach has resulted in a haphazard collection of double jeopardy tests difficult for lower courts to apply.

Some members of the Court have focused not on the Clause's self-evident test, but rather on the capacity of successive prosecutions to burden defendants unfairly. Thus, the Court has tended to create protection against successive prosecutions according to either subjective notions of what is unfair, or perceptions of traditional American notions of fairness. Arguably, criminal defendants should receive such protection. However, the Court need not rely on vague standards of fairness, rather than the text of the Double Jeopardy Clause, to explain why the Clause requires such protection. The multistep test itself is sufficiently flexible to allow the Court to expand or contract double jeopardy rights against successive prosecutions merely by expanding or contracting its definitions of "same offense" and "jeopardy."

Arguably, the multistep test is not flexible enough to prevent all unfair successive prosecutions, because some successive prosecutions are unfair even if undeniably not for the same offense. For those, however, the Due Process Clause is a perfect source of additional protection against the oppressive governmental action of unfair successive prosecutions. By invoking the Due Process Clause, rather than the Double Jeopardy Clause, to achieve this purpose, the Court would inject no more vagueness than already exists under the Due Process Clause and would preserve the clear structure to which double jeopardy analysis is so amenable.

Thus, the proposed methodology, comprising a two-step double jeopardy inquiry with an additional due process inquiry in the successive-prosecution context, would eliminate the problems evident in the various approaches taken by the Supreme Court justices. In contrast to those approaches, the proposed methodology offers fairness to defendants, flexibility in defining the terms of the Double Jeopardy Clause, consideration for the governmental prerogative in vindicating different interests, and clarity to lower courts—all while being faithful to the historically neglected language of the Double Jeopardy Clause.